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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-357

2,431.4 Acres of Land, More or Less, Situated in Hancock County, Mississippi, and CLAY CALHOUN, et ux.,

Petitioners

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 2, 1973.

OPINIONS BELOW

The first appeal to the United States Court of Appeals, Fifth Circuit, is reported in 384 F2d 180. The second appeal to the United States Court of Appeals, Fifth Circuit,

is reported in 473 F2d 1389 first case, rehearing and rehearing en banc denied April 11, 1973. The opinion on Petitioners' first appeal from the Lands Commission to the District Court is unreported. (Appendix A infra, p. 13) The opinion on Petitioners' second appeal from the Lands Commission to the District Court is unreported. (Appendix B, infra, p. 27) The opinions of the first and second Land Commission hearings were not reported. (Appendix C, infra, p. 39 , and Appendix D, infra, p. 61 , respectively.

JURISDICTION

The Judgment of the Court below (Appendix E, infra, p. 84) was entered on June 27, 1972. Rehearing was not sought in the lower court. The time for filing a petition for writ of certiorari was extended to and including September 8, 1973, by Order signed by Associate Justice Lewis F. Powell, Jr., on July 5, 1973. The jurisdiction of this court is invoked under 28 S.S.C. Sect 1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) Is Rule 71A (h) primarily an assurance of the right of trial by jury, and if so, was the refusal of petitioners' demand for a jury an abuse of discretion and contrary to the spirit of the rule where they were forced to try the case the second time before a Lands Commission, two of three members of which served as Commissioners during the first Commission trial, where the second trial occurred approximately five years after the taking, the improvements were removed, a view of the premises was not had because the property had been severely damaged by two hurricanes, one of the Commissioners had received a threatening communication from the District

Judge who appointed him, the Commission had established a pattern of slavish attention to uniformity of awards, rather than treating each parcel as unique, and the Land Commission had disposed of all but two parcels out of hundreds taken?

(2) Are land owners deprived of their property without just compensation by the action of the Land Commission finding certain sales to be comparable, but misapplying the sales to the landowners' property?

(3) Did the District Court, passing on exceptions to the Commission's report, commit prejudicial error by taking judicial knowledge of a sale of the landowners' property burdened with the easement seven years after the taking as a factor to be considered in arriving at a determination of whether the Commission's award was clearly erroneous?

(4) Are the landowners entitled to attorney's fees and costs where they have had to try their case three times and where the first trial was reversed because of the prejudicial remarks of the United States Attorney in his closing argument, the second trial aborted because of the inability of the court reporter hired by the government, to furnish a transcript adequate for review?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth and Seventh Amendments, United States Constitution.

2. Federal Rules of Civil Procedure 71 (Appendix F, infra, p. 86).

FACTS AND MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

On April 8, 1963, Petitioners were the owners of 2,064.64 contiguous acres of land, in Hancock County, Mississippi, which was condemned by the government along with thousands of other acres of land, for the construction of rocket test facility. The government chose not to take petitioner's property in fee simple and imposed an easement on it (Appendix G, infra, p. 92). In summary, that perpetual easement prohibited the construction on their property of any structure capable of human habitation or occupancy; and condemned the substantial improvements they had put on the property.

The government demanded a trial by jury, which resulted in a verdict in the amount of $175,000.00. Petitioners appealed to the Fifth Circuit, asserting among other errors that the United States Attorney in his closing argument to the jury made several prejudicial remarks. The Fifth Circuit reversed. Calhoun v. U.S. 384, Fed2d 180.

In the meantime the lower court had appointed a Rule 71(a) Land Commission, and remanded the case to the Commission. Petitioners requested that the court recall the remand to the Commission and give them a jury trial. The court refused to do so, and petitioners sought to have the Fifth Circuit issue a writ of mandamus to the lower court to give petitioners a jury trial. The Fifth Circuit refused to issue the writ, and petitioners went to trial before the Commission, which awarded Petitioners $195,620.00. All three Commissioners joined in that report, but Commissioner Weber later filed a supplemental opinion, disagreeing with the majority's

evaluation of certain of the land. It became apparent to the Petitioners that the lay members of the Commission may have failed to discharge their duties as Commissioners, by letting the Chairman, an attorney, decide the case, and they gaye notice of their intention to take the deposition of Weber. Upon receipt of the notice to take the deposition of Weber, the United States Attorney obtained an ex parte order citing Petitioners' counsel to appear before the District Judge to show cause why the subpoena should not be quashed. At that hearing the dissent of Commissioner Weber and the possibility that the Commission may have become "...free wheeling"(1) were brought to the Court's attention, and that the petitioners could only document those facts by taking the deposition of Weber.

The Court's response was a castigation of Weber. (Appendix H, infra,p.93), who in due course was called upon to sit as a Commissioner on the second Lands Commission trial with the same Chairman and a new Commissioner who had replaced one who had died. Petitioners again asked for a jury trial and that request was refused. A motion to reform the Commission was also denied. Petitioners again sought Writ of Mandamus and the Fifth Circuit again denied the petition.

The second Commission trial lasted about three weeks, and resulted in a report increasing just compensation to $253,620.00. Petitioners filed timely exceptions which were heard by Judge Nixon. He concluded that the case should be remanded to the Commission on certain limited points. That hearing resulted in a further increase of the award to $264,690.00. Before the final award was entered Petitioners sold substantially all of

their land in Hancock County burdened with the easement, for $260,000.00. The purchaser intended to build ponds on the property and grow catfish. That sale took place some seven years after the taking, and did not represent the highest and best use of the property, unburdened by the easement.

At the conclusion of the second Commission trial, the landowner asked for attorney's fees and costs in the amount of $113,000.00.

In all three of the trials both sides used many comparable sales. The Petitioners strongly relied upon the comparable sale of Kottwitz to Gack, as establishing value before the taking. While the Kottwitz property was upstream from Petitioners' it was bounded by the same road, fronted the same stream and abutted Petitioners' property. That sale was so crucial to Petitioners' case that they took the depositions of both Kottwitz and Gack to establish that the sale was arms length and was truly comparable. That sale represented a conservative "before" value of Petitioners' land of $316.00 per acre, or a total before value of $652,224.00. To fix the value of the property after the imposition of the easement, the government relied on the Bowers to Necaise sale, which represented a sale of small portion of property in the easement area of $35.00 per acre. The Land Commission in the second hearing found as a fact that Kottwitz to Gack and Bowers to Necaise were the most comparable sales, but it decreased the former and increased the latter. Having found those sales to be comparable, the Commission refused to multiply those values times the Calhoun acreage. Had the Commission done so, the award would have been $579,984.00 for land alone exclusive of improvements. The Commission's finding in that the adjoining

property that sold for $316.00 per acre reflected a value of $159.60 per acre for the subject land was contrary to all evidence. Petitioners have contended that failure of the Commission to apply its findings of fact has resulted in a deprivation to them of just compensation in the amount of $315,294.00, plus the value of improvements.

REASONS FOR GRANTING THE WRIT

(1) Although U.S. v. Reynolds, 397 U.S. 14, leaves no doubt that a land owner has no constitutional right to a jury trial of an eminent domain case, the abolition of the T.V.A. Commission by Public Law 90-536 and the debate[2] thereon indicate that the assignment of an eminent domain case to a 71A Commission over the landowners' demand for a jury should be the exception rather than the rule.

Petitioners suggest that there is a need for this court to adopt a limited view of the court's discretion to remand a case to a 71A Commission, so that the desires of the land owner to have a jury trial shall overrule the reference to a Lands Commission in all but the most extraordinary circumstances. Such an interpretation would give the option to the landowner in most cases to have his case tried by a Commission or by a jury.

In the present case, by the time the Petitioners were to try the case before the Commission for the second time, they had been through one jury trial, an appeal, a first hearing before the Land Commission, exceptions to the Commission's report, and had been in court approximately six years. At the conclusion of the second full Commission hearing

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(2) 113 Congressional Record 18929 (Dec.15, 1967)

and partial hearing they had been in court eight years. Those efforts on the part of the Petitioners have resulted in an increase to them of "just compensation" from $80,000.00, the initial deposit, to $264,690.00, the latest award. But those efforts have seen the attrition of witnesses and Petitioners' resources.

Petitioners submit that they should be given at least one more opportunity to obtain just compensation -- this time before a jury.

(2) The best evidence of market value is a comparable sale. In Nichols on Eminent Domain [3] the weight to be given comparable sales is discussed:

> Such evidence is capable of direct proof; it has considerable probative value. Market value is of course the price at which an article sells in the open market. This price is fixed by sales actually consummated. Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than the speculative opinions of witnesses; for truly, here is where 'money talks'. (emphasis added)

While the Commission found the Kottwitz to Gack and Bowers to Necaise sales to be comparable, it did not apply that undisputed finding of fact. [4]

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(3) Vol. 5, sect 21.3(1), 3rd Ed.

(4) Although the government could have taken exception to those findings it did not do so; they are, therefore, undisputed.

It is the contention of the Petitioners that the failure of the Commission to apply undisputed evidence has resulted in the deprivation to them of just compensation in the amount of $315,294.00, plus the value of improvements. It was suggested to the district court and court of appeals that under Merz those courts could modify the award of just compensation, adding that amount. It is here suggested that if the writ is granted, and the court agrees with Petitioners, that this court can direct the lower court to amend its award by adding that amount to the award.

(3) It is so basic to the law of eminent domain, that no citation is needed to support the contention that the value of the property taken is to be fixed immediately before and after the taking. Yet the district court, in its review of the Land Commission report, went beyond the record to take judicial knowledge that seven years after the taking the petitioners sold a portion of their land burdened with the easement for over $250,000.00. We do not address this argument to the possible impropriety of the district court going beyond the record made before the Commission. A careful reading of Merz seems to give the district court broad discretion while sitting as an appellate court on an appeal from a Land Commission.

What is disturbing to the Petitioners is the language of the district court:

> Significantly, these property owners have been awarded and paid the amount of this award in the sum of $264,690.00 and they have now sold the vast majority of their property for more than a quarter of a million dollars, and still have

possession of 213 acres of this property on Jordan River. (Appendix B, P. 27)

That statement was contained in an opinion of the court dated June 27, 1972, over nine years after the taking. The inarticulated premise in that statement is they have "gotten enough". It was prejudicial in the extreme for the district court to go outside of the record to take judicial knowledge of the sale of the property burdened with the easement. They could not cross examine the judge who thought that evidence so important; they could not rebut it or explain it. It clearly had no part in the court's deliberations and clearly prejudiced the Petitioners.

(4) Petitioners have not been in court for over ten years out of some uncommon desire to litigate; they have been fighting for their constitutionally mandated right to "just compensation". They could have accepted the government's tender of $80,000.00,[5] but they chose to fight for their rights. In spite of the prejudice injected by the U.S. Attorney in their first trial, the jury awarded Petitioners over twice the government's initial tender. They fought for and secured a new trial at the hands of the Fifth Circuit, and over their objections were forced

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(5) That tender represented an estimate of $38.75 per acre, <u>including</u> improvements for over 2000 acres of high ground 40 miles from the metropolitan area of New Orleans; the land had 30,000 feet of water front. The improvements alone were worth more than the original tender.

to a second trial before 71A Lands Commission, which increased their award to $195,620.00. They were forced to a new trial before a Commission, over their objection, because the government's employee had failed in her duty to furnish a transcript from which the District Judge could determine if the Commission was clearly erroneous. But their efforts resulted in an award of $253,000.00, an increase of 23% over the Commission's previous award. They were forced to a third limited hearing before the Commission which made its final award of $264,690.00.

Throughout the numerous trials, Petitioners have sought to use the very best appraisers available to them, and they have paid dearly for their efforts. They have expended over $113,000.00 in witnesses and attorneys' fees and other expenses.

We do not think that this court in Dohany v. Rogers, 362 U.S. 370 intended to hold that in no instance is the land owner to recover his costs, reasonably incurred while fighting for his right to just compensation. Petitioners submit that the writ should be granted for the court to permit an examination of the equitable considerations which in this case and other cases in the future may justify a land owner to be paid his costs, reasonably incurred, while fighting for his right to "just compensation".

CONCLUSION

It is respectfully submitted that for the reasons stated, a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

_____

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 1973, four copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, were served upon Hon. Glen R. Goodsell, Attorney, Appellate Section, Assistant Attorney General Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530, by mailing said copies by United States mail, postage prepaid to the address indicated above.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA — PLAINTIFF

VS. — CIVIL ACTION NO. 2670
Tract No. 118-E

2,431.43 ACRES OF LAND, MORE OR LESS, SITUATE IN HANCOCK COUNTY, STATE OF MISSISSIPPI, AND CLAY CALHOUN, ET AL — DEFENDANTS

On April 8, 1963 the Plaintiff, United States Government, filed its Declaration of Taking and impressed a restrictive easement upon this 2064.60 acre tract, owned by the Defendants in the buffer zone of the NASA Project in Hancock County, Mississippi. The Commission appointed by the Court to hear this case awarded the owners just compensation in the amount of $195,735.00 for the taking of the easement. It is within the power and is the duty of this Court to either adopt the report, modify it or reject it in whole or in part, or the Court may receive further evidence, or may recommit the case to the Commission with further instructions, all as provided in Civil Rule 53(e)(2).

This Court, having carefully considered the entire record with the Findings and exceptions thereto and the responses of the Commission to such exceptions, and having considered additional Memoranda submitted by the landowners and the government in support of their positions and heard argument on their behalf on November 18, 1969, is of the opinion and finds that this case should be recommitted to the Commission in order that a new Hearing may be held and Findings thereon may be rendered by the Commission.

Appendix "A"

This case has been before the Court in one form or another for a number of years. On September 8, 1965 a jury returned a verdict of $175,000.00 as just compensation for the imposition of the easement on this tract, but the case was reversed and remanded by the Fifth Circuit Court of Appeals on the ground that an improper statement had been made to the jury in final argument by the Assistant United States Attorney. Calhoun v. U.S., 384 F.2d 180 (C.A. 5, 1967). This Court referred the case to the 71-A Land Commission by an Order of Reference dated July 25, 1967. Hearings were held by this Commission on April 15-18, 1968 after a request for a jury trial had been denied the defendant by this Court and the Court of Appeals. An additional hearing was held by Commission Chairman Robert Nichols on July 22, 1968, and the Findings and Conclusions of the Commission were filed on September 3, 1968, although a separate Finding and Conclusion was filed by Commissioner W.W. Webre on October 8, 1968. The Review Hearing before this Court was held on November 18, 1969. It is indisputable that the landowners herein, the government, and certainly this Court, desire to see this case brought to a conclusion as soon as possible. Nevertheless, in this Court's opinion, any delay in achieving a final determination which may be occasioned by this remand is absolutely necessary in order to assure that the compensation awarded the landowners is in fact just and their right to appeal is preserved. Although it is questionable whether any one particular claimed error would necessitate reversal of this case and a new Hearing, the cumulative effect of several errors requires such action.

One of the primary reasons a new hearing must be held in this matter is that the transcript of the proceedings before

the Commission, belatedly filed by the Court Reporter on May 9, 1969, is incomplete and filled with many errors and omissions. The late filing of the transcript and the original shorthand notes, filed May 7, 1969 under Court order, did not prejudice the defendants to such a degree that a remand would be required. However, an attempted review of the Commission's Findings and Conclusions by this Court and possibly the Court of Appeals would not only be extremely difficult and perhaps impossible, but a review based upon this inaccurate and incomplete record would also be highly prejudicial to the defendants and to the government.

While Counsel for both parties are able to stipulate to some corrections which should be made in the transcript, agreement as to many is unachievable. An Order was issued by this Court on November 10, 1969 requiring the Court Reporter to file her tapes recorded at Hearings in this case, which have now been filed. While these tapes may be of some aid in correcting this transcript, there are incorrect or omitted portions that even the use of tapes can be of little assistance in correcting. For example, one of the most flagrant omissions was the incomplete recordation of the July 22, 1968 proceedings before Commissioner Nichols. The Court Reporter certifies that she was not able to transcribe this portion of the record due to a faulty place in new recording tape and due to the rapidity of speech. It is not the duty of this Court nor does it feel it is able to attempt correction of the filed transcript by use of the tapes.

The Court recognizes that the failure to present a complete and accurate record for review is not the fault of the

landowners, the government or the Commission, but rests squarely on the Court Reporter herein. If she was unable, as the filed transcript so indicates, to accurately transcribe the proceedings due to the rapidity of speech or for some other reasons, the Commission, upon being so informed would certainly have required the witnesses and counsel to speak less rapidly or obtained the services of another reporter who could accurately transcribe the proceedings. It is too late now, however, to hypothesize on that which should have been done to correct the errors made. The only solution, in this Court's opinion, is to recommit the case to the Commission for a new hearing in which a complete and accurate record can be transcribed and a review by this Court, if necessary, can thus be fairly accomplished.

This Court is further concerned with the procedure employed by the Commission after the conclusion of the April 15-18 Hearing. The Commission denied the landowner's request for a continuance prior to that Hearing sought by him to allow this Court time to rule on his Motion for a change in the Court's Instructions to the Commission. On June 5, 1968, supplemental Instructions were filed by this Court which sustained in part and overruled in part the Motion of defendant landowners. While the better procedure would have been to have granted the continuance pending a decision on this Motion, the Commission could have considered the effect of the Supplemental Instructions prior to issuing its Findings. The principal objection to the Instructions involved the scope of restrictive easement, which the Court interpreted to constitute a building restriction, whereas the landowners claimed it to be a vague imposition of a "restricted area in, on, across, and over

subject tract." After full consideration of the issue, this Court refused to alter its above interpretation by its June 1, 1968 Order, filed June 5, 1968. It was necessary, however, for the Commission to fully consider other changes and supplements to the Court's Instructions before rendering a decision in this case. It is the contention of the landowners that this was not done.

A supplemental Hearing was held before only the Commission Chairman, Nichols, on July 22, 1968. While the incomplete transcript makes it impossible to determine all that transpired at this Hearing, argument was evidently heard on the effect of this Court's Supplemental Instructions. The landowners sought a rehearing or new trial in light of the Supplemental Instructions. Also, additional evidence and argument thereon was presented concerning the testimony of Wooten, the government's only live witness. Furthermore, the testimony of Hines and Turner, appraisers, which had been ruled inadmissible in the April 15-18 Hearing was admitted for consideration. The transcript reveals that the Motion for Rehearing was taken under advisement but a subsequent ruling on this Motion is not found in the transcript or Findings.

The landowners contend that the full Commission did not consider this Court's Supplemental Instructions and argument pursuant thereto, the argument and additional evidence concerning Wooten's testimony, the motion for a rehearing or new trial in light of the same, and the subsequently admitted testimony of Hines and Turner. In support of this contention the affidavit of George E. Morse, counsel for defendant landowners, is before

the Court. In this affidavit the Affiant states that he telephoned Commissioner Webre on September 11, 1968 subsequent to the filing of the Commission's Findings and Conclusions on September 3, 1968, signed by all three Commissioners, and was advised by Mr. Webre that he had not been consulted about the final decision of this cause; that he had signed Conclusions of Law sometime in June, 1968, prior to this Court's ruling upon defendants' Motion for Supplemental Instructions; and that he was not in accord with the Findings with respect to the before value of land lying north of Catahoula Creek. Commissioner Webre did thereafter file a separate Finding and Conclusion on October 3, 1968 recommending an increase in the award of approximately $20,000.00. The Affiant further states that on September 5, 1968 he called Commissioner Emmett V. Thomas and was informed by him that he had not been consulted on the final draft of the opinion; that he had signed the Conclusions in blank prior to the July 22, 1968 rehearing; that he had understood that Mr. Nichols, an attorney, would write the balance of the opinion which dealt with the ruling on legal matters, Thomas not feeling qualified to rule thereon; and that he was in accord with the award of the Commission made in this cause.

In further support of this contention the Court is referred to the original copy of the Findings which does indicate that the date affixed thereto, on the page containing the Conclusions of Law was first typed "_____ day of May, 1968"; that the word May was later erased and Aug. typed in its place; and that Aug. was later crossed out and Sept. written above in addition to the date of the 3rd being entered in the heretofore blank space.

On the other hand, the Findings do contain an insert in which the testimony of Hines and Turner is reviewed; the Commission states in its Answer to the Landowners' Objections that it carefully considered the change of instructions before filing the final report, and was under "the impression" that the Motion for Rehearing argued on July 22, 1968 was overruled.

This Court is unable to determine from the evidence presented and the incomplete transcript of the July 22 Hearing exactly what transpired subsequent to the conclusion of the April 15-18 Hearing. The procedure employed by the Commission, however, is indeed unorthodox. It is this unclear and unorthodox nature of the Commissioners' actions which, in addition to the reasons heretofore and hereinafter enumerated, requires a new hearing in which this Court can be certain that all the evidence was considered by all three Commissioners and together a determination was made as to the compensation to be awarded these landowners. The actions of the Commission, not unlike those of this Court, must leave nothing to doubt; the fact that proper procedure was followed must thus be absolutely clear. The Commission is cautioned that upon the new hearing on this matter, all Commissioners must be present and together to effectively act on any question presented, pursuant to the instructions of this Court.

The Commission is composed of three able and conscientious individuals who endeavor, in this Court's opinion, to make a fair determination of each case presented. When errors are committed, this Court will seek correction upon review. The Court is not impressed with the landowners' references to the Commission as a

"free wheeling body, that had little or no regard for justice or judicial procedure," or indications that the Commissioners were biased and prejudiced against the defendants. Such name calling is not only unnecessary and unfounded but is offensive to this Court which appointed this Commission.

It is unclear from the record whether the Commission gave proper consideration to comparable sales made after the October 6, 1961 announcement of the NASA Project. The landowners are entitled to " . . . the market value of the property at the time of taking . . ." which in this case was April 8, 1963. Olson v. U.S., 292 U.S. 246, 255, 34 S.Ct. 704, 78 L.Ed. 1236 (1934). This Court has recently held that any evidence as to increases in land values after the announcement of the NASA Project should be admitted and then weighed with due consideration for the danger of any artificial price inflation caused by such announcement. See U.S. v. 1886.33 Acres of Land, Civil Action No. 2924 (Bosworth). This procedure is well expressed in U.S. v. 63.04 Acres of Land, 245 F.2d 140 (C.A. 2, 1957), which involved the admission of a comparable sale consummated after the filing of the Notice of Taking, the Court stating:

> "There is no absolute rule which precludes consideration of subsequent sales. The general rule is that evidence of similar sales in the vicinity made at or about the same time is to be the basis for the valuation and evidence of all such sales should generally be admissible . . . The generality of this rule is limited, however, by the consideration that a condemnation itself

> may increase prices and the government should not have to pay for such artificially inflated values. See International Paper Co. v. U.S., 227 F.2d 201 (C.A. 5, 1955). But that possibility does not produce a hard and fast exclusionary rule. In every case it is a question of judgment as to the extent of this danger and, particularly where a judge is sitting without a jury, it would seem the better practice to admit the evidence and then weigh it having due regard for the danger of artificial inflation."
>
> (Emphasis added)

While the transcript does reveal that comparable sales made after October, 1961, were referred to by various witnesses, we are not convinced that they were given proper consideration. If these sales were merely admitted and then summarily rejected without following the weighing procedure outlined above, this would have the same effect of holding such sales inadmissible. The fact that improper consideration was given to sales subsequent to 1961 is indicated on page 17 of the Findings, in that three sales are there rejected as having been made "after the announcement of the subject NASA Project and possibly affected thereby." An even stronger indication of this is found in the Commission's Answer to Defendants' Objection Number 16, wherein the Commission states:

> "The first condemnation suit was filed by the government in the matter of the lands to be taken for the Mississippi Test Facility on October 26, 1961,

thereby announcing to the world that this area, which included the defendant's lands, would be either taken in fee or have the subject easement imposed thereon. This date is considered to be controlling even though the Declaration of Taking of the subject lands was not actually filed until April 8, 1963. Any sale after October 26, 1961, and outside both the fee and easement area, would possibly be affected by the impact of the project which is the cause of the subject taking and, therefore, said sale is rendered inadmissible."

(Emphasis added)

Thus, in the new hearing of this cause, the Commission should not only admit evidence of post 1961 sales, but such sales must also be weighed and considered with due regard for the danger of artificial inflation.

In the absence of a complete and accurate transcript this Court is hesitant to attempt determination of many of the remaining objections urged by the defendant landowners. It is hoped that most, if not all, can be resolved upon the new Hearing in this cause. The Court can, however, make several observations concerning the record as it now stands in the hope of facilitating this second Hearing before the Commission.

It is axiomatic that the Commission is the finder of fact and may accept or reject the testimony of any witness in whole or in part. Likewise, the acceptance or rejection of any submitted comparable sale is left to the sound discretion of the Commission and will not be disturbed by this Court unless such determination is found to be clearly erroneous.

If a different valuation is accorded various portions of the subject tract, however, the better procedure would be to not only list in the Findings those comparables utilized but also the specific area of the tract to which they are comparable. This procedure was employed by the Commission in its Answer to Landowners' Objections. In this same line, the Commission should be very careful to include within the Findings all comparables used. The Court notes that the Davis to Walker sale, set forth in the Answer, was omitted in the Findings. Under such circumstances the Court cannot actually know if this sale was utilized by the Commission as a comparable or not. This sale was evidently considered, as evidenced by the Answer, in determining the value of much of the land lying North of the river to which Commissioner Webre assigned a higher value in his Separate Finding and Conclusion.

This Court agrees with the Commission's ruling that prices paid by the government in order to settle other landowner claims are not fair indications of market value, and are thus inadmissible. Slattery Co. v. U.S., 231 F.2d 37 (C.A. 5, 1956); Evens v. U.S., 326 F.2d 827, 351 (C.A. 8, 1964). Furthermore, by attempting to examine the witness Wooten on his method of appraisal in the Scivique sale and other properties in the same category, the landowners sought to have the prices admitted indirectly when they could not do so directly. Likewise, this Court does not consider the Commission's failure to admit the appraisal of Tate and Mitchell of the Crump Estate, such appraisal having been made for estate tax purposes, to have been improper. The appraisal of an estate for tax purposes is certainly colored with

a number of considerations peculiar to the same and could very possibly not be a fair indication of market value. The cases cited by the landowners in support of admissibility are not controlling. Certainly, when other comparable property in the vicinity has not been sold recently or in significant amounts, resort can be had to other less satisfactory data. This, however, is not such a case.

The landowners' objection to the Commission's failure to provide a category for land 1,000 ft. from the Texas Flat Road deserves some discussion. The determination as to whether a separate category is required for this land and if so, the valuation of such, should be made by the Commission upon rehearing. The Commission's answer that such land was included in the $300 valuation given land within 1,000 feet south of the river is on its face inaccurate. This homesite river land would seem to encompass at least 240 acres, as found by the Commission, and the Texas Flat Road is seemingly much farther away from the river. This should be not taken as a suggestion, however, that the same or an additional category or valuation should or should not be accorded this land upon the new hearing on this matter.

This Court feels that comment as to the weight accorded the testimony of Smallwood, Wooten and Price would be improper at this time in light of the incomplete and inaccurate record of all that transpired at the Hearings.

Although we are not making a final determination as to whether the Silica deposits are in fact taken by the imposition of this easement, the Court is not impressed with the argument and evidence presented by the landowners and present in the

record at this time. If possible, however, the Court would like to see a determination made by the Commission as to the approximate amount of minable Silica on the subject tract, if any, and estimated profit realizable therefrom.

The Findings of the Commission are unclear as to the value, if any, which was accorded the fences, gate and roads on this tract. Upon rehearing, the Commission should make it absolutely clear in its Findings whether these fences, gates and roads were in fact taken, and if so, whether the value of such items were actually credited therein as a part of the land values. If the Commission finds that a value should be given these items, a separate valuation would be preferable but not essential.

There remains before this Court four motions of the defendant landowners. The first motion asks the Court to take judicial notice of eight different propositions. The first four relate in one way or another to the alleged rumors as to the cessation of operation by NASA in Hancock County and the return of all property heretofore taken. This Court feels it sufficient to direct the Commission that the cessation of such operation or return of property is not certain and completely unknown at this time. Any evidence or argument as to such should not be admitted or allowed and the Commission is instructed to disregard any of these rumors. These four specific items on which judicial notice is sought are therefore overruled. The remaining four propositions relate to the scope of a restrictive easement, having been fully considered and rejected by this Court in the Supplemental Instructions filed July 5, 1968, and are therefore overruled. The other three motions do not, in this Court's opinion merit discussion in light of the Court's ruling today, and are hereby overruled.

Therefore, this case is recommitted to the Commission in order that a new Hearing, not inconsistent with this opinion, may be held and Findings pursuant thereto may be rendered by the Commission.

An Order which conforms with the foregoing, shall be presented in accordance with the Rules of this Court.

Biloxi, Mississippi
December 3rd, 1969

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NUMBER 2670
TRACT 118-E

UNITED STATES OF AMERICA — PLAINTIFF

V.

2431.4 ACRES OF LAND, MORE OR LESS, HANCOCK COUNTY, MISSISSIPPI (CLAY CALHOUN, ET UX, OWNERS) — DEFENDANTS

This is a proceeding for the expropriation of a tract of acreage in Hancock County, Mississippi for public use in connection with the NASA project in that area. This matter is before the Court on report of the real estate commission, exceptions of the property owners thereto, supplemental report of the real estate commission, and exceptions of the property owners thereto. The sole purpose of the proceeding is for a determination as to just compensation due Mr. and Mrs. Clay Calhoun for the taking of their land for this public use. The taking of this private property for public use consisted of the application of a building restriction on this property which so zoned the land as to prohibit the maintenance of any structure on the land which was capable of human habitation. The purpose of the building restriction, or zoning regulation, was to prevent persons from living or residing in the area who might be subjected to personal injury occasioned by the launching, and testing of outer space rockets by such agency of the United States Government on these lands. The government did not seek to take the fee simple absolute title to this property, but in this proceeding has sought the application of an easement, or building restriction in this area known as the buffer zone wherein persons could sustain a personal injury from shock or concussion

Appendix "B"

occasioned by the launching of these very heavy and powerful outer space rockets in furtherance of this government program. [1] A copy of the proposed easement is incorporated.

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[1] The perpetual easement on the subject land in favor of the United States provides: "The estate taken for said public uses in the hereinafter described Tract 118-E is a perpetual and assignable easement for the establishment, maintenance, operation and use of a restricted area in, on, across and over the land hereinafter described as Tract 118-E consisting of the right to prohibit human habitation or human occupancy of dwellings and other buildings, and the right to prohibit the construction of dwellings and other buildings susceptible of being used for human habitation or human occupancy; together with all right, title, and interest in and to the dwellings and other buildings now situated on the tracts last above specified and which are susceptible of being used for human habitation or human occupancy, including the right to demolish, remove, relocate, or leave in place said dwellings and other buildings; the right to post signs indicating the nature and extent of the Government's control; and the right of ingress and egress over and across said land for the purpose of exercising the rights set forth herein; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines; reserving, however, to the landowners, their heirs, executors, administrators, successors and assigns all right, title, interest, and privilege as may be used and enjoyed without interfering with or abridging the rights, title, and interest hereby taken for said public uses."

The matter of a determination of value of land is an extremely elusive question about which no two individuals will completely agree. This matter has been before this Court and on appeal to the United States Court of Appeals for this Circuit, and now back to this Court for sometime since this property was taken for this public use on April 8, 1963. A jury in this Court presided over by this judge first awarded these property owners $175,000.00 for the imposition of this easement on 2064.64 acres of land in Hancock County, Mississippi. That award was nullified and reversed by the United States Court of Appeals because of a flippant remark by an attorney to the jury in the closing argument. On remand, this case was submitted to a commission, duly appointed and constituted under Civil Rule 71A of the Federal Rules of Civil

Procedure. That commission was duly and completely instructed by the Court as to their duties and obligations, both as to the government and to the property owners. This Court originally was confronted with several hundred of these cases for trial before juries, and tried many of them before juries, and became very much impressed, as this procedure slowly progressed, with the fact that the Court could have no possible restraint upon the juries to see that everybody was treated fairly and justly and exactly alike. Adjoining property owners represented by different counsel and different witnesses received different awards which on several occasions outraged property owners. The Court thereupon sought to correct this evil, and to dispose of this mountain of cases, by appointing a real estate commission under Civil Rule 71A. There have been three awards made by this real estate commission for just compensation to these particular property owners on this same tract since said jury award was vacated. The first commission award was $195,620.00. The second commission award was $253,620.00. The final commission award which is now before this Court in this case is for $264,690.00. The commission which made this award was selected by the judges of this Court for their knowledge of Gulf Coast real estate values, and for their known honesty and integrity and fair dealing. Two of the commissioners are Gulf Coast realtors. The third commissioner who is chairman of the commission is a very capable and outstanding lawyer from Jackson with very extensive experience in eminent domain proceedings. Among other things, this commission was instructed and directed by the Court as to the importance of these awards being uniform and as equal as humanly possible and perfectly fair to these property owners in every instance. The record before the Court in this case is, therefore, very voluminous, and necessarily requires

extensive abridgment in discussion.

There are certain fundamental and underlying principles which merit discussion and special application here. It must be borne in mind at the outset that the burden of proof as to the value of this property, and more particularly as to its value before the taking, less its value after the taking, for the resulting figure of just compensation, rests squarely upon the property owners.[2] It is incumbent upon these

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[2] In United States v. Certain Parcels of Land in Rapides Parish, La., (5CCA) 149 F.2d 81, 82 the Court said: "'In an Eminent Domain proceeding, the vital issue, and generally the only issue, is that of just compensation', and the burden of establishing the amount was on the appellee. Its ill assorted and misfit collection of evidence valuing separately land, buildings, trees and plants, did not satisfy this burden. Instead of producing evidence as to the value of the land, to be condemned, as a whole and in its then condition, on which a jury might rest its verdict, appellee produced witnesses who estimated: the value of the house in vacuo; the value not of the land as a whole and as it then was but as separate lots into which it was suppositiously divided; the value of the bulbs not as their presence added to the value of the land as land but as though they were being separately condemned; and then sought by the verdict to conglomerate this mass of unrelated and inharmonious testimony into a consistent whole."

The burden of establishing the value of the lands condemned was upon the owner and not the government. The appellant was not prejudiced by the ruling that the government had the burden of proving the value and hence the right to open and close the argument. Furthermore, such a ruling may not be the basis of an assignment of error. Anderson-Tully Co. v. U.S., (5CA) 189 F.2d 192; U.S. v. Savannah Shipyards, (5CA) 139 F.2d 953.

The burden of establishing the value of lands sought to be condemned was on respondent. U.S. v. Powelson, 319 U.S. 266; 63 S.Ct. 1047.

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property owners to have shown this commission by the greater weight of the more convincing evidence in this case as to the just compensation due them for the public taking of their private property as aforesaid. On this appeal taken by these property owners from this award, the property owners are now obliged to show this Court that these finding of facts and ultimate conclusions as to just compensation are clearly erroneous under Civil Rule 53(e)(2). It would be difficult,

if not almost impossible, for any expert witnesses as to real estate values to be in accord on their figures without very close collaboration with each other. We are dealing here with a very attractive piece of rural acreage which has been very attractively and quite extensively improved by these property owners who have developed and improved this property very largely for their enjoyment and pleasure. It is surely not a commercial project in any sense of the word. This Court has very carefully and extensively examined and considered this voluminous record and recalls much of the testimony and contentions made thereasto before the Court and jury at Biloxi some years ago.

Both sides presented before the Court in this case elaborate and extensive contentions in support of their respective conclusions. The government contends that the award of the commission in this case in the sum of $264,690.00 is excessively generous. On the other hand, the property owners contend by the use of comparable sales that the award should have been $652,224.00. [3] No property owner who is not desirous

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[3] This case is designed and intended for the constitutional purpose of fixing just compensation for the taking of private property for public use under the Fifth Amendment. The value of fences, gates and prefabricated bridge beams not taken and not damaged is not within the sweep of this proceeding. Mississippi State Highway Commission v. Treas, 20 So.2d (Miss.) 475 holds: "The before and after taking rule being the measure of damages applicable to this case, it follows that the appellees cannot recover damages for specific injuries to their remaining land, but that evidence of such injuries is competent if, but not unless, they would affect the market value of the remaining land."

That is to say, the property owner must relate his damages to the after value of the property by assigning the value thereof to which the property is reduced by reason of the taking. This is not a Tucker Act case. It is not a proceeding wherein ownership of property may be contested. It is specifically and solely and only a proceeding for the determination of just compensation for the taking of private property for public use and such compensation must be fixed in this case only by the rule stated. Cf: Mississippi State Highway Commission v. Hillman, 195 So.(Miss.) 679, 681.

In United States v. Certain Parcels of Land in Bossier Parish, La., (5CCA) 149 F.2d 81, 82 the Court said: "In an Eminent Domain proceeding, the vital issue, and generally the only issue, is that of just compensation', and the burden of establishing the amount was on the appellee. Its ill assorted and misfit collection of evidence valuing separately land, buildings, trees and plants, did not satisfy this burden. Instead of producing evidence as to the value of the land, to be condemned, as a whole and in its then condition, on which a jury might rest its verdict, appellee produced witnesses who estimated: the value of the house in vacuo; the value not of the land as a whole and as it then was but as separate lots into which it was suppositiously divided; the value of the bulbs not as their presence added to the value of the land as land but as though they were being separately condemned; and then sought by the verdict to conglomerate this mass of unrelated and inharmonious testimony into a consistent whole."

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of selling his property can be justly criticized for seeking the very highest possible amount for his property taken for public use. These property owners even contend with great vigor that the application of this easement to their property renders it completely worthless; that is to say, that the before value of the property exceeds a million dollars, but that the actual fair and reasonable value of the property after the application and enforcement of the easement is nil or worthless. That contention is quickly negated by the warranty deed of these property owners to only a part of this property, dated May 25, 1970 recorded in Deed Book V-8, at page 221 in the Chancery Clerk's office at Bay St. Louis, Mississippi where these property owners conveyed only a part of this property to the Chisholm Chef Systems, Inc. for $260,000.00. That conveyance appears in this record for identification only, but its existence is a matter of public record, and is notice to everybody of its existence. In addition thereto, these property owners still own in this same tract approximately 213 acres; and approximately 10 acres thereof abut the north side of the Jordan River, and approximately 203 acres are on the south side of the Jordan River. The property owners in such conveyance expressly excepted this easement from the

warranty and conveyance, and expressly reserved unto themselves the just compensation due them by the United States for the taking of this property by the imposition of this easement [4] on these 2064.64 acres of land.

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[4] In Mississippi State Highway Commission v. Wagley, 231 So.2d 507, 508 provides: "The rule is well settled that the present value of land sought to be condemned in eminent domain proceedings is not to be estimated simply with reference to the condition in which the owner has maintained it or for the use to which it is at the time applied, but with reference to any use to which it is reasonably adapted. The best or most valuable use to which the property, which is taken for the public use, is adapted should be considered. 29 C.J.S. Eminent Domain § 160, p. 1024, and cases cited. 'Mere speculative uses cannot be considered. There must be some probability that the land would be used within a reasonable time for the particular use to which it is adapted. * * * There must be a present demand for the land for such purpose or (sic) a reasonable expectation of such demand in the near future.' 29 C.J.S. Eminent Domain § 160, pp. 1026, 1027. See also State Highway Commission v. Brown, 176 Miss. 23, 168 So. 277. (239 Miss. at 316, 317, 123 So.2d at 427.) The difficulty in applying the rule in this case is that the property was zoned residential at the time of the taking and, of course, could not be used for commercial purposes until it had been rezoned. There was evidence tending to establish that there was a reasonable probability that it could be rezoned commercial in the near future, but even though this is true, the property could not be valued as if the rezoning had already been accomplished."

It is a matter of common knowledge that a property owner is qualified as an expert to give an opinion as to the value of his property. But an opinion as to value of property in this proceeding has probative value only in the event it takes into account existing comparable sales between a willing buyer and a willing seller where neither acts upon any kind of compulsion so that the sale is completely voluntary in every respect. The parties in this proceeding have both observed and complied with that rule with wide degree of [5] variation and disagreement as to their conclusions.

[5]

In St. Joe Paper Co. v. United States, (5CCA) 155 F.2d 93, objection was interposed to the testimony of an expert witness as to when it was said that he was ignorant of property values in the vicinity of appellant's property, and of values of comparable property. The Court said that such question is for the trial judge and his decision is conclusive unless clearly erroneous as a matter of law. The trial judge in approving the witness as an expert said that he has testified that he had nine years experience in appraisal of land and some five years of that time in Florida; that prior to his appraisal of this land he appraised different tracts within a radius of ten miles; that he has an opinion which he arrived at from his experience and from talking with people, with persons who were acquainted with the market value of the land in question; and from an investigation of public records whereby he ascertained what sales had been made and the prices paid therefor, of land comparable to the land in question. The Court held that he was qualified to express an opinion as an expert on the question of the value of land for just compensation purposes.

In considering the testimony of expert witnesses as to the value of gas leases, the Court through Mr. Justice Cardozo had said: "If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury * * * or to a judge * * * or to a statutory board." Baxter v. Arkansas Natural Gas Corporation, 64 S.Ct. 729.

It is the view and considered opinion of this Court under all of the circumstances and inferences present that this commission has acted intelligently, honestly, fairly and justly with these property owners in making this award. Some disagreement is extant as to the depth of some of the lots and the values assigned thereto from the water's edge. This Court in the interest of uniformity and in deference to past awards here and now reiterates its own unqualified approval of the depth of such lots at one thousand feet. Surely these property owners are entitled under recent decisions to the highest and best use value of their property even if such value is enhanced, or increased by knowledge of the plans of the government, or other public agencies to construct in the area a project which will inflate the value of such property. This Court is of the very positive opinion that this present award

is not subject to criticism for any supposed violation of that rule. Any declaration of policy by this Court contrary to either of these stated principles is vacated so that no reflection may exist upon this, or any previous adjudication as to just compensation in this area and particularly on this project.

There is much contention in this record as there has been before this Court in this case from its inception as to minerals alleged to be on this property, and as to improvements thereon such as fences and gates. This taking of private property does not involve any minerals or any oil and gas, either on or under the land.[6] There is likewise no taking of

[6] There can be no recovery for both value of land and its mineral deposits as separate items. Georgia Kaolin Co. v. U.S., (5CA) 214 F.2d 284.

In condemnation proceedings, evidence valuing separately land, buildings, trees and plants did not satisfy burden which rested on landowner of establishing amount of just compensation. U.S. v. Certain Parcels Rapides, (5CA) 149 F.2d 81.

"No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land." (Quoting from 267 U.S. at p. 365). William P. Newton v. United States, (5CA) 405 F.2d 1167, 1169,

any timber on this land. There is no taking of any fences or gates. This expropriation or eminent domain proceeding in Mississippi is governed by the laws of Mississippi. That is the rule in this Circuit in such cases.[7] There is no taking of

[7] Rules of evidence in Florida (locality of land) and not Federal Rules given condemnation proceedings in Federal Court in Florida. St. Joe Paper Co. v. U.S., (5CCA) 155 F.2d 93.

any concrete pillars on the land which was intended for use in constructing a bridge. The sole and only measure of damages available to a property owner must arise out of an application

of the before value and after value rule. Obviously, the value of all sand and silica, like the value of all oil and gas, and all timber must be valued as a whole in the aggregate before the taking and then likewise be valued after the taking, and the difference between the two would be just compensation. That is absolutely all there is to this case and nothing more. This Court wholeheartedly agrees with the commission that separate values cannot be assigned to different elements of this land and be separately recovered. That is the fair import of footnote six, supra. That is what is known in Mississippi as the Hillman rule.

The property owners' unsigned twenty-eight pages of objections to the original findings and conclusions of the commission and their nineteen pages of unsigned objections to the commission's supplemental findings appear here as unimpressive contentions that fail to convince this Court in any respect to any degree that the ultimate findings and conclusions of this real estate commission are clearly erroneous within the purview of Civil Rule 53(e)(2). [8] Any more specific dealing

[8] Losses due to frustration of business plans because of condemnation of land are not ordinarily compensable. The judicial ascertainment of fair market value of property condemned may not rest upon conjecture. In Cameron Development Co. v. United States, (5CA) 145 F.2d 210, the evidence showed that there had been excavated and removed eighty-three cubic yards of shell marl which was utilized in the construction of runways. The trial court refused to permit several witnesses to testify that these deposits greatly enhanced the market value of the property. The Court said: "The mere physical adaptability of the property to use as a source of supply of shell marl, in the absence of a market for its commercial production, did not effect and increase in its market value." Cf: Southern Amusement Co. v. United States, (5CA) 265 F.2d 34.

with and treatment of these extensive exceptions or objections would result in an intolerably extensive discussion of these contentions without any corresponding value to anyone.

Significantly, these property owners have been awarded and paid the amount of this award in the sum of $264,690.00, and they have now sold the vast majority of their property for more than a quarter of a million dollars, and still have possession of 213 acres of this property on the Jordan River. It is perfectly apparent to this Court under all of the facts and circumstances in this record that these property owners have been justly and fairly and honestly dealt with by the United States in the settlement of this claim, and that they have received just compensation for the public taking of their private property under this perpetual easement.[9] This Court adopts as its own the findings and conclusions of this commission, and finds that the property owners have not shown by a preponderance of the evidence that such findings and conclusions are clearly erroneous, or were arrived at by the application of any wrongful or improper guidelines or principles.[10] The commissioners' report in this

[9] Condemnor not liable for fees of counsel and expert witnesses unless statute expressly so provides. City of Jackson v. Lee, 106 So.2d 892.
Attorneys' fees are not embraced within just compensation to be paid for lands taken by eminent domain. In Re Clarks Estate, (5CA) 187 F.2d 1003.

[10] This same perpetual easement was before this Circuit on an appeal from this same commission wherein the Court said: "This appeal is basically an attempt to have this court review the conflicting facts which were before the commission. However, it is not our function to reweigh the evidence. Evans v. United States, 326 F.2d 827 (8 Cir. 1964); Buena Vista Homes, Inc. v. United States, 281 F.2d 476 (10 Cir. 1960); United States v. Glanat Realty Corp., 276 F.2d 264 (2 Cir. 1960); Seale v. United States, 243 F.2d 145 (5 Cir. 1957); Stephens v. United States, 235 F.2d 467 (5 Cir. 1956). As stated in Buena Vista Homes v. United States, supra: 'This court will not assume the function of retrying the facts. A finding based on sharply conflicting evidence is conclusively binding here.' Similarly the report of the commission measures up to the standards required in United States v. Mers, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964)." Mrs. Rosa Lee Craft Rousseaux, et al v. U.S. (5CA) 394 F.2d 123, 124-125. Cf: George W. Prechter, Jr. v. United States, (5CA) 400 F.2d 124.

case is sufficiently explicit as to the application of necessary principles to comply with all of the requirements of the Mark case. This Court fully understands exactly what the commissioners did in reaching their conclusions and approves their ultimate conclusions. Surely, nobody can quarrel with the conclusion that this proceeding does not cover bridge components just as it does not cover imaginary values of silica supposed to be upon these lands when not one grain thereof is taken. The before and after value on those items are necessarily identical! Such findings and conclusions of the commission in this case are here adopted by this Court and will be affirmed. Likewise the award as the ultimate conclusion of this commission in the amount of $264,690.00 will be affirmed, and all objections and exceptions thereto will be denied. There will be no assessment of costs in this case.

A judgment accordingly may be presented within five days for entry by the Court.

June 27, 1972

UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

VS.	**CIVIL ACTION**
2064.60 ACRES OF LAND, MORE OR LESS, SITUATE IN HANCOCK COUNTY, MISSISSIPPI AND CLAY CALHOUN	**NO. 2670** **TRACT 118-E** **Filed Sep 3, 1968**

FINDINGS AND CONCLUSIONS OF EMINENT DOMAIN COMMISSION

Come now, Robert G. Nichols, Jr., Emmett V. Thomas and W. W. Webre, the duly appointed Commissioners acting herein under an Order of Reference issued on June 14, 1965, and in pursuance to Instructions granted the Commission by the Court on July 5, 1965, and Supplemental Instructions granted on June 1, 1968, and file this report of a hearing held in this matter at the Federal Court Building in Biloxi, Mississippi, on April 15 through 18, 1968, to-wit:

FINDING OF FACT

This 2064.60 acre tract is located in the east central portion of the buffer zone. There were certain improvements on same as of April 8, 1963, when the Government filed its Declaration of Taking seeking to impose the easement recited in the Instructions given the Commission herein.

Catahoula Creek enters the property on

its western edge and meanders to the east where it is joined by Bayou Bacon to form the headwaters of the Jordan River. The gravelled Texas Flat Road borders the southern portion of the property. There is a dirt road crossing the extreme northwestern portion of the subject tract as well as a United Gas pipeline easement which traverses the northernmost section (see maps: Plaintiff's Exhibit No. One, Two and Three).

The Government's witness, Wooten, described the property as being 3.5 miles west of Highway 603 and along the Texas Flat Road. He stated that Catahoula Creek and the Jordan River flow 2.5 miles through the subject tract, that the river was scenic with high and low banks and that Catahoula Creek had fine sandbars along it.

He gave the fair market value of the entire tract before the imposition of the easement (including improvements but excluding timber and minerals) as:

Land	$212,850.00
Improvements	30,760.00
Total "Before"	$243,613.00
Fair market value after imposition of the easement (excluding timber, minerals and improvements)	103,250.00
Just Compensation	$140,360.00

In explaining his land use breakdown, he introduced Plaintiff's Exhibit No. Two, same being a map with various colors indicating the uses, which were as follows:

	COLOR	LOCATION	ACRES	USE	BEFORE VALUE	AFTER VALUE	JUST COMPENSATION
1.	Green	N. of creek	1055	Timberland	60.00	50.00	10,550.00
2.	Green	S&W of creek	235	Woodland	80.00	50.00	7,050.00
3.	Orange	S of creek	490	Open & pasture	150.00	50.00	49,000.00
4.	Purple	S of creek	200	Campsite	200.00	50.00	30,000.00
5.	Yellow	S of creek	50	Homesite w/Camp-site	275.00	50.00	11,250.00
6.	Purple cross hatch	N. of creek	35	Campsite	100.00	50.00	1,750.00
				TOTAL			$109,600.00

Wooten explained that item #2 above was worth more than item #1 because of the accessibility; as to item #3, the general topography is generally sloping but has a ditch through it; item #4, these campsites run back 3 acres deep from the river; as to item #6, these campsites figured only 1 acre deep because of poor accessibility. He further stated that he included the roadway and approximately 8 miles of fencing with metal gates and a concrete trough in the land values. He offered as comparable the following sales: Davis to Walker; Walker to Rollins; Moore to Jumper; Skipper to Bounds; Ford to Mize; Ford to Sweezy; Haas to Stanfield; Taylor to Elmer; Lomax to Calhoun; Mitchell to Isbell; Ellis to Harwell; McLeod to Stewart.

On cross-examination, he admitted that there were numerous subdivisions along the Jordan River; that, he had made no inquiry as to whether there were plans for paving of the Texas Flat Road; that, none of the subject property is below 3 feet above mean sea level, with the highest point some 25 feet. He further admitted that the Kotzwitz to Gack sale was adjacent to the subject property but he did not use same because, in his opinion, a buyer had paid more than the market value; "I could find no other land of this type that brought this price". The Government's second witness was the testimony of Sidney L. Price, who had testified in the previous trial of this cause on September 8, 1965. Plaintiff introduced a copy of the Price death certificate and a certified copy of the entire testimony in the previous trial (Plaintiff's Exhibit No. Five). Same was admitted after determination having been made by the Commission that the former testimony was given upon issues that the Defendant in that case had the same interest and motive in his cross-

examination that the present Defendant has (Hertz vs. Graham, 23 F.R.D. 17; Home Insurance Co. vs. Gerlach, 220 Miss. 732, 71 So. 2d 787). In his testimony, Price qualified as an expert in matters of real estate. He gave the fair market value of the entire tract (including minerals, timber, improvements and land) before the imposition of the easement at $355,000.00. His fair market value of the entire tract, less improvements (ie: including minerals and land), was $190,500.00, and he recommended just compensation in the sum of $134,500.00.

His breakdown of land values was as follows:

50 acres high campsite at $275.00;

235 acres low campsite at $175.00;

200 acres woodlands south of river at $85.00;

1090 acres woodlands north of river at $60.00;

490 acres subdivision homesites at $150.00;

His value of the improvements was main house (depreciated by 25%), $15,600.00; barn (depreciated by 25%), $8,200.00. Total improvements, including well, dog yard and fencing as well as house and barn, $29,145.00. He did not give a complete breakdown of the individual values of the improvements. Also, he stated that the main residence and cottage were removed prior to his making his appraisal (see page 9, Plaintiff's Exhibit No. 5).

He offered fifteen sales as comparable,

but failed to show the comparability of the majority of them to the subject tract.

Defendant's first witness was the owner, Clay Calhoun. He stated that upon his purchase of the property, he surveyed it, then cleared about 585 acres and then put in shell roads. That, he had built a barn, a manager's house and a home on the property and from time to time, planted part of the land mostly with cattle feedstuffs. He stated that he had bought the land for investment purposes and had spent at total of $278,883.88 on the property. However, on cross-examination, he admitted that these figures, while spanning the years from 1954 through 1962, were totals spent by him, which may have included taxes, labor, fees for management, insurance on buildings, interests on loans and such personal equipment as bulldozer and road graders.

He described the condition of his property and illustrated same by showing some 80 film slides to the Commission (same introduced as Defendant's Exhibit No. 8). The pictures, as well as the testimony, indicated that the improvements consisted of a well built residence, a manager's cottage, barn, two 3 inch wells, a concrete watering trough, a concrete duck pond, a dog yard, an outdoor shower, and a barbecue pit. He described his land as having cleared pastures with the grass neatly clipped; a picnic area with a flagstone paved area over riverbank; large sandbanks on both sides of Catahoula Creek, some of which were higher than the head of a rider on horseback; bridle paths which ran parallel to the river; 7 lakes, each of which was good for fishing; the northern portion not being cleared of bush. As to values, he gave the following fair market

value of the entire estate before the imposition of the easement at $450.00 per acre, or a total of $929,250.00. His fair market value after the imposition of the easement - 0; he demanded just compensation in the total sum of $929,250.00, stating that, in his estimation, the easement was so restrictive as to render his land of no value after the imposition of same. His opinion of the easement further concluded that "anything you could physically occupy cannot be constructed on the land after the easement. It goes further than human occupancy." He introduced a sign posted by the NASA authorities on the fee area, same advising all persons to keep out (Defendant's Exhibit No. Ten). In short, his interpretation of the easement was that it amounted to a taking of his land in fee.

This witness then gave the history of his attempts to have Silicia mined from his land. He began with a history of his taking samples of the sand on Catahoula Creek and submitting same to several Engineers and prospective buyers (See Defendant's Exhibit No. One, Two, Three, Four, Six and Seven). He stated that he had ascertained that there was a market for 150 to 200 tons per year of Silicia in a New Orleans area and that he intended to put a dredge mining plant on his property. He then testified that the entire operation was thwarted by the imposition of the easement due to the fact that he was advised that no such plant as he had anticipated could be built on his property (Defendant's Exhibit No. Nine shows a picture of a similar Silicia plant).

Defendant's witness number two was Earl A. Hastings, a Research Mineralogist, who had been a staff geologist for the State of

Alabama and was presently employed by the R. E. Wilson Mining Company. He stated that he was familiar with sand and sand by-products and that he had taken samples from the subject land along the Catahoula Creek area from the western end for 1400 feet to the east. He agreed with the letter of Eustis Engineers (Defendant's Exhibit No. One) in that, of the two million tons of sand located on Defendant's land, five hundred tons of Silicia could be taken therefrom. He assumed that the sand could be mined with a royalty of 20 cents per ton, which would give the landowner $100,000.00 over the period of the mining operation.

On cross-examination, this witness admitted that he had made no borings on the property, but had referred to the engineering reports in their entirety. He further admitted that he could not tell exactly how much sand was in the creek bed itself. He further stated that his conclusions were drawn on the basis of a 1400 foot stretch along the creek extending back 600 feet each side of the stream. This witness offered no values as to land or improvements.

Defendant's third witness was Russell LeBlanc, an Engineer registered with the State of Louisiana. His testimony was confined to the description of the type of plant that would be necessary to make the mining of Silicia feasible on the Defendant's property. He further stated that it would be possible to mine the sand and transport same to a plant off the site, but stated that this would hardly be feasible due to the increase in the cost.

Defendant's fourth witness was Max Derbes, Sr., who qualified as an expert in matters of real estate (see Defendant's Exhibit No. 16

for his qualifications).

This witness gave the land the following values:

Fair market value before imposition of the easement:

582 acres of cleared land and 445.8 acres of land on the south side of the river, or a total 1,027.8 acres at $400.00	$411,120.00
235.8 acres north of and within 1,300 feet of the river at $350.00	82,530.00
801 acres over 1300 feet north of the Jordan River at $250.00	200,250.00
Total	$693,900.00

His fair market value after the imposition of the easement was:

2064.6 acres at $35.00	72,261.00
Just compensation (land only)	621,639.00
Plus improvements	71,200.00
Total Just Compensation	$692,839.00

His value of the improvements were as follows: Residence - $16,900.00; caretaker's house - $4300.00; barn - $12,885.00; five goat sheds - $200.00; fences and gates - $13,886.00; 3960 feet of shell road - $8,910.00; 3,280 feet of shell road -

$4,920.00; 2 wells - $2,600.00; one barbecue pit - $340.00; one stone watering pool - $625.00; one duck pond - $400.00; one patio at riverbank with dressing room - $900.00; one cattle chute - $200.00; 29 bridge pilings - $3,014.00; 28 bridge pilings - $1,120.00; total value of improvements - $71,200.00.

He offered as comparable the sale from Kottwitz to Gack, Manjet to Trimble, Mollere to Gulf State Properties; Williams to Bosworth; Walker to Rollings; Irwin to Colby; Rivers to Shaddinger; Walker to Poche; Taylor to Elmer; Williams to Pearl River Development Company.

This witness admitted that the timber and minerals were not taken by the easement but he claimed that the landowner was prevented from removing the timber by the easement.

He also stated that the property had the possibility of the development of subdivision with a golf course which could go on simultaneously with the mining of Silicia; that, the subdivision would take about a 15 year sellout and that the golf course would consume approximately 100 acres. He made no discount for the sellout period of the lots nor did he give any costs of the construction of the golf course. He claimed that the subject easement was the broadest he has ever seen, saying: "I wouldn't give you 10 cents an acre for it after the easement." His comparable sales are set out on Defendant's Exhibit No. Nineteen.

The Defendant's fifth witness was Gary Smallwood who stated that he had done three years of appraisal work with a recognized firm and had had three years of college. He stated that he went on the Calhoun property

to investigate the land while working for one Jack Mann, a recognized appraiser, and helped the latter write up a rough draft to reflect one use; and had then drafted another report to reflect another use. His fair market value of the entire estate before the imposition of the easement was $525,000.00. He did not state whether or not this included minerals and timber and gave no after value. On cross-examination, he admitted that he did not make a complete appraisal and that his before value only included those improvements "about which I had knowledge". He identified the appraisal made by Jack Mann (Defendant's Exhibit No. 20) but admitted that this exhibit was not a final report and that the appraisal had never been finally completed. This witness offered no comparable sales.

Defendant's sixth witness was Charles C. Deano, who qualified as an expert in real estate matters. He gave the highest and best use of the subject lands as residential subdivision for homesites of from 3 to 10 acres each. He gave the fair market values of the land as follows:

Fair market value before imposition of the easement (including timber but excluding minerals):	
Improvements	$ 65,400.00
Land	788,450.00
Total	853.850.00
Fair market value after imposition of the easement (excluding timber):	
Land	-0-
Just Compensation	$ 853,850.00

His values of the improvements were as follows: dwelling house plus septic tank and air conditioning units - $17,432.00; caretaker's house plus air conditioning - $5,244.00; barn - $17,248.00; barbecue pit - $500.00; 2 wells - $3,600.00; reinforced bridge piling - $4,000.00; roads - $16,290.00; septic tanks - $550.00; landscaping - $500.00; patio with shower - $1,125.00; watering pool - $600.00; duck pond - $400.00; total improvements - $65,417.00.

He offered as comparable, sales from Taylor to Elmer, Kottwitz to Gack; Manjet to Trimble; Egen to Dawsey; Hayden to Hall; Williams to Pearl River Development Company; Bowers to Necaise;

His opinion of the subject easement was that same takes all the rights of the owner and is equivalent to a fee taking. He further stated on cross-examination, that his interpretation of the easement was that the Government could disallow access to the owner at any time, and, if the land was posted so as to disallow access, the easement would prevent the owner from cutting his timber or exploring for minerals.

Defendant next called C. L. Wooten under subpoena duces tecum to produce appraisals made by the Government on Tracts No. 1811-E, Tract 2332, Tract 2333, Tract 1910, Tract 14-E and Tract 2318. An objection was sustained to Wooten giving any information from these appraisals which the Government had made for its use in eminent domain proceedings against the said tracts.

Defendant's eighth witness was H. C. Mitchell, who had made an appraisal of the Crump Estate of some 3,400 acres for estate

purposes in dealing with the Internal Revenue Service. An objection was sustained to the introduction of this appraisal.

Defendant's ninth witness was Ferris Tate, who qualified as a real estate appraiser. He gave the highest and best use of the property for subdivision purposes with golf course, air strip and bridle trails before the easement and for timberlands after. He gave the values as follows:

Fair market value before imposition of the easement (including timber):	
Improvements	$ 82,376.34
Land	574,100.00
	656,476.34
Fair market value after imposition of the easement (excluding timber):	
2,064.6 acres at $25.00 an acre	51,615.00
Just Compensation	$ 604,861.34

He valued the improvements as follows: resident - $17,784.90; two air conditioning units (attached to the houses) - $650.00; septic tank - $350.00; landscaping - $750.00; caretaker's house - $4,724.20; septic tank (caretaker's house) - $250.00; two air conditioning units (caretaker's house) - $300.00; barn - $15,112.80; 5 goat houses - $250.00; fencing and gate - $17,693.44; roads - $13,830.00; 2 artesian wells - $3600.00; barbecue pit with patio - $480.00; watering pool - $625.00; duck pond - $400.00; shower and patio - $1,250.00; cattle chute - $200.00; 29 bridge pilings - $3,016.00; 28 bridge

pilings - $1,120.00; total improvements - $82,376.34.

He offered the following comparable sales: Kottwitz to Gack; Manjet to Trimble; Doby to Pearl River Development Corporation; Irving to Colby; Walker to Rollins; Taylor to Elmer; Seal to Haas; Bowers to Necaise; Mitchell to Pigott; and Wheat to Pigott; Firman to McRaney; Mitchell to Broughton.

Tate introduced Exhibit No. 24, same being a map showing the breakdown of his land values. These values were as follows: 174 acre riverfront (north side - 5 acres deep) at $355.00 - $61,770.00; 316 acres riverfront (south side - 5 acres deep) at $505.00 - $159,580.00; 440 acres south side of river (between river and Texas Flat Road) at $300.00 - $133,500.00; 190 acres land on Texas Flat Road (5 acres deep) at $325.00 - $61,750.00; 220 acres land beginning 5 acres from north side of river and extending back 5 acres at $225.00 - $49,500.00; 720 acres land on extreme north side of river at $150.00 - $108,000.00; Total land value - $574,100.00.

His understanding of the easement was that it was very restrictive but that the owner may cut and sell his timber and could market his oil and gas or other minerals. He also stated that there were twenty subdivisions located along the Jordan River, the closest of which was 1.5 miles from the subject tract. As to the sales of the lots for subdivision purposes, he admitted that it would take at least a 15 year sellout period but he allowed no discount.

The Defendant then introduced the deposition of Melvin Dovith (Defendant's Exhibit No. 25).

Defendant next introduced the testimony of Walter E. Mussell (Defendant's Exhibit No. 27). Both direct and cross-examination of this witness seemed to have been concerning the interpretation of the subject easement, this witness stating that "the restriction associates itself only with structures." He is of the opinion that no building can be constructed in the buffer zone with solid sides to same under the general idea that no building shall be located on the taken land subject to human habitation.

The landowner next offered the testimony of George Hines and J. Ed Turner as found in Volume II, pages 735-740 and pages 622-667. This testimony was admitted for the same reasons as was the testimony of Sidney Price.

The testimony of Hines simply was that he concurred in the appraisal made by Turner.

Turner gave the highest and best use of the land as subdivision purposes before the easement and as timberlands after. His fair market value before the easement was: 1027.8 acres lying between the Texas Flat Road and the river at $500.00 an acre; 396.8 acres lying north of the river at $400.00 per acre; 640 acres in Section 20 at $250.00 per acre: total "before" value - $832,620.00. His "after" value was $25.00 per acre and he recommended just compensation for the land only at $781,005.00. To substantiate his figures, he offered the sales of Manjet to Trimble, Billups to Hartsman (1962), Taylor to Elmer, Cockwitz to Gack, Walker to Rawlings, Moore to Jumper and Skipper to Bounds.

At this point, the Defendant rested and the Government brought Henry M. Tolar as its rebuttal witness. This witness qualified as

an expert geologist and identified a report he had made concerning previous borings on the subject land (Defendant's Exhibit No. 15). His testimony was confined exclusively to the amount of sand on the tract and the possibilities of mining Silicia therefrom.

This concluded the testimony offered the Commission.

The Commission finds as a matter of fact that, before the imposition of the easement, the subject lands had the highest and best uses of homesites, campsites, pasture, woodlands and timberlands.

The Commission finds as a matter of fact that the imposition of the subject easement does not include the taking of either timber or minerals (the latter intended not only to include the oil and gas but also sand or Silicia) nor does it preclude the owner from leasing, exploring for or attempting to produce any such minerals. In arriving at this conclusion, the Commission has carefully considered the deposition of Mr. Dovith (Defendant's Exhibit No. 25) as well as the testimony of Mr. Mussell (Defendant's Exhibit No. 27). Both of these gentlemen, while in supervisory capacities with the United States Corps of Engineers, are able to give nothing more than their opinions as concerns the types of structures which might be maintained after the easement. The Commission is of the opinion that the Defendant chose several borderline hypothetical structures about which to query these two governmental employees. Under the instructions given the Commission by the Court, the former must conclude that the minerals are not being taken. However, should the Defendant decide to mine same, as is his right, and should said mining process require a

comparable building complex as now used by the Dawes Silicia plant (see Defendant's Exhibit No. 9), and should the Corps of Engineers refuse Defendant's application to construct same, he would then have a remedy in the District Court. This would be no different from any controversy arising out of the construction of the meaning and limitations of the easement.

The Commission has held before and does now so find that the comparable sale method and the income approach method are the only two manners in which experts may give acceptable testimony as to values in cases such as these. No testimony was offered here on the income method; therefore, the comparable sales method is the alternative.

The Commission rejected the testimony of Defendant's witness, Smallwood, because he gave an opinion of value based upon an incomplete appraisal and only upon "those improvements of which I had knowledge"; he offered no comparable sales and failed to give an "after" value. It is doubtful in the minds of the Commission as to whether this witness qualified as an expert in real estate matters.

As to the comparable sales, the witnesses, Wooten, Derbes, Tate, Turner and Deano attempted to adjust said sales in order to bring same into comparability with the subject lands. The testimony of the appraiser, Price, fails to reflect his method of adjustment. The adjustment of sales varied almost with the personalities of the appraisers: Wooten, Derbes, Tate, Turner and Deano all used the 1959 sale of Taylor to Elmer which abuts the southeast corner of the subject tract; each set the per acre purchase price at about $160.00 and each came up with a different adjusted value for parts of Defendant's lands.

Wooten, Derbes, Turner and Tate each used the 1960 sale from Walker to Rollins; each agreed on the basic data of the sale, and then each gave a different adjusted value for portions of the subject lands.

Derbes, Tate and Deano each offered the 1961 sale from Manjet to Trimble. None of them recited the same basic facts but each arrived at the same adjusted values.

While not accepting each adjustment made by each witness, the Commission finds the following sales to be comparable to the subject lands: Walker to Rollins, Taylor to Elmer, Moore to Jumper, Skipper to Bounds, Haas to Stanfield, Lomax to Calhoun, Mitchell to Isbell, Kottwitz to Gack, Manjet to Trimble, Williams to Boswith, Irwin to Colby, Taylor to Elmer. The Commission rejects the following sales: Ford to Mize, Ford to Sweezy (both isolated timberland tracts in no wise comparable to any portion of subject lands); Ellis to Harwell (entirely out of the area of the subject, this sale being made to join up with other lands purchased by grantee's company); McLeod to Stewart (although fronting on water, one-third of the sale is marshlands); Mollere to Gulf States Properties (this sale outside the easement area, after the announcement of the subject NASA project and possibly affected thereby); Rivers to Shaddinger (not comparable as sale tract lies in the "Y" between two blacktopped public roads); Walker to Poche (not comparable in that sale is cutover timberland on paved Highway 43); D. Williams to Pearl River Dev. Co. and Billups to Hartsman (outside easement and after announcement of NASA project); and Doby to Pearl River Dev. Corp. (outside easement and after announcement of NASA project.

As to the improvements, the testimony was as follows:

IMPROVEMENTS	WOOTEN	DERBES	TATE	DEANO	TURNER
Main residence	$15,600.00	16,900.00	19,534.90	17,432.00	17,784.00
Caretaker's house	2,100.00	4,300.00	5,274.20	5,244.00	4,714.00
Barn with sheds	8,200.00	12,885.00	12,112.80	17,248.00	
Wells (2)	3,125.00	2,600.00	3,600.00	3,600.00	
Dog yard	765.00	no value	no value	no value	
Telephone line	650.00	no value	no value	no value	
Barbecue pit, shower area	250.00	340.00	480.00	500.00	Balance of improvements - $56,646.00
Goat sheds (5)	75.00	200.00	250.00		
Fences & gates	no value	13,886.00	17,693.44		
Shell road	no value	13,830.00	13,830.00	16,290.00	
Watering pool	no value	625.00	625.00	600.00	
Duck pond	no value	400.00	400.00	400.00	
Patio at river	(incl. with barbecue)	900.00	1,250.00	1,125.00	
Cattle chute	no value	200.00	200.00		
57 bridge piling	no value	4,134.00	4,136.00	4,000.00	
Landscaping	no value	(in house)	(in house)	500.00	
TOTALS	$ 30,760.00	71,200.00	82,376.34	65,417.00	83,196.00

The Commission finds that the fences and gates and the shell roads were not taken by the easement but should have been reflected in the land values.

The Commission further finds that the government did not take the unused bridge pilings and that same were not such improvements as would be compensable. The Commission is not impressed by the owner's testimony that he bought said pilings to construct a bridge across Catahoula Creek, but that the imposition of the easement had deprived him of the incentive to do so, and that he, therefore, considered the pilings to be of no value.

The Commission finds as a matter of fact the improvements had the following values: main residence - $16,900.00; caretaker's residence - $3,000.00; barn and sheds - $12,000.00; wells (2) - $3,000.00; dog yard - $765.00; telephone line (installed by owner to residence) - $650.00; barbecue pit - $250.00; 5 goad sheds - $200.00; watering pool - $350.00; duck pond - $200.00; patio and shower - $950.00; cattle chute - $200.00; Total - $38,465.00.

As to the land values, the Commission finds that the subject lands which lie within 1000 feet of the Catahoula Creek - Jordon River would have its price affected by said body of water: 120 acres on the north side of the river and 240 acres on the south side. However, the campsite on the north side of the creek, because of lack of access, would have less per acre value than would the south side. The Commission further finds that the testimony of the witnesses, together with the proper adjustments of the comparable sales, would indicate the following values before the imposition of the easement for the catagories of Defendant's lands: timberlands

north of river - $60.00 per acre; 120 acre campsite north of river - $200.00 per acre; 240 acres campsite and homesite south of river - $300.00 per acre; 500 acres of pasture south of river - $175.00 per acre; 235 acres woodlands south of river - $80.00 per acre.

The Commission further finds as a matter of fact that, after the imposition of the easement, the subject lands had a value of $50.00 per acre.

CONCLUSIONS OF LAW

The Commission concludes from the evidence presented it, that the subject lands had the following values:

Fair market value before imposition of the easement:

(A)	North of river:	
	120 acres campsite at $200.00	$24,000.00
	970 acres timber at $60.00	58,200.00
(B)	South of river:	
	240 acres crop and homesite at $300.00	72,000.00
	500 acres pasture at $175.00	87,500.00
	235 acres woodlands at $80.00	18,800.00
		260,500.00
(C)	Plus Improvements	38,465.00
TOTAL		298,965.00

Fair market value after imposition of the easement:

2064.6 acres at $50.00	103,230.00
Just Compensation	$195,735.00

WHEREFORE, the Commission would recommend unto the Court that the owner be paid the sum of $195,735.00 for the taking of his improvements and the imposition of the easement on his lands.

RESPECTFULLY SUBMITTED, this, the 3rd day of Sept., 1968.

s/Robert G. Nichols Jr.
ROBERT G. NICHOLS, JR.

s/Emmett V. Thomas
EMMETT V. THOMAS

s/W. W. Webre
W. W. WEBRE

CERTIFICATE

This is to certify that Robert G. Nichols, Jr., Chairman of said Eminent Domain Commission, has this day mailed a true and correct copy of the foregoing Findings and Conclusions of Eminent Domain Commission, to Honorable Robert Hauberg, United States Attorney, Federal Building, Jackson, Mississippi, and to Honorable Walter J. Phillips, Attorney, Bay St.Louis, Mississippi, to Honorable George Morse, Attorney, P.O.Box 100, Gulfport, Mississippi, and to Honorable Ernest Carrere, Attorney, 225 Baronne Street, New Orleans, Louisiana, via United States Mail, postage prepaid.

This, the 3rd day of Sept., 1968.

s/Robert G. Nichols Jr.
ROBERT G. NICHOLS, JR., CHAIRMAN

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI, SOUTHERN DIVISION

UNITED STATES OF AMERICA

VS.

CIVIL ACTION
NO. 2670
TRACT 118-E

2064.60 ACRES OF LAND,
MORE OR LESS, SITUATE IN
HANCOCK COUNTY,
MISSISSIPPI, AND
CLAY CALHOUN

FINDINGS AND CONCLUSIONS OF EMINENT DOMAIN COMMISSION

Comes now, Robert G. Nichols, Jr., W. W. Webre and Harry Joachim, the duly appointed Commissioners acting herein under an Order of Reference issued on June 14, 1965, and in pursuance of instructions granted this Commission on July 5, 1965, as amended by Supplemental Instructions granted on April 11, 1968, and having had this case recommitted to it by Order of Walter L. Nixon, Jr., United States District Judge, said Order being dated December 8, 1969, but incorporating therein the Court's opinion dated December 3, 1969, and file this report of a hearing held in this matter at the Federal Court Building in Biloxi, Mississippi, on May 12-15 (inclusive), June 15-19 (inclusive), and August 3-6 (inclusive), 1970, to-wit:

FINDING OF FACT

This 2064.60 acre tract is located in the east central portion of the buffer zone (see Segment Map; Plaintiff's Exhibit No. 3). There were certain improvements on same as of

April 8, 1963, when the Government filed its Declaration of Taking seeking to impose the easement recited in the instructions given the Commission herein.

Catahoula Creek enters the property on the western edge and meanders to the east where it is joined by Bayou Bacon to form the headwaters of the Jordon River. The gravelled Texas Flat Road borders the southern portion of the property. There is a dirt road crossing the extreme northwestern portion of the subject tract. (See map; Plaintiff's Exhibits Nos. 3 and 4).

To open its case, the Government offered the testimony of Sidney L. Price who had testified as an appraiser in a previous hearing of this case. A copy of the death certificate of Mr. Price was introduced as well as a certified copy of the entire testimony of Price in the former trial (Plaintiff's Exhibit No. 1). Mr. Price gave the fair market value of the entire tract (including minerals, timber, improvements and land) before the imposition of the easement of $355,000.00. His fair market value of the entire tract, less improvements (ie: including minerals and land) after the imposition of the easement was $190,500.00. He recommended just compensation in the sum of $134,500.00. He did not give a breakdown of the individual values of all the improvements and also stated that the main residence and cottage were removed prior to his having made his appraisal. Price offered 15 sales but failed to show the comparability of the majority to the subject tract.

The Government's witness, Wooten, an employee of the Army Corps of Engineers, stated that he had been the chief of the appraisal section in charge of the acquisition of the

Government project for which the subject land was taken (Record, page 7). He stated that he had been on the property, had seen and measured the improvements (R. 11). He said he understood the easement in question (R. 14) and that he had considered the effect, if any, of the proposed location of Interstate 10 on the market value of land in the area (R. 15, 37).

Mr. Wooten gave the following values, including land and improvements, but excluding timber and minerals. Fair market value before the imposition of the easement: $243,613.00; fair market value after the easement: $103,250.00; he recommended just compensation in amount of $140,360.00 (R. 15).

He explained that he had used the comparable sales method (R. 8) and offered sales which he had verified (R. 27-35; 74-109). The location of these sales were designated on a map (Plaintiff's Exhibit No. 6). He described the land (R. 38, 43-48) introducing an aerial photo (Plaintiff's Exhibit 4), described the improvements (R. 48-50) giving the latter a total value of $30,760.00 (R. 52). He proceeded to give the replacement value less depreciation on each of the improvements (R. 54-56). By way of explaining his determination of the highest and best use of the lands, Wooten introduced a map (Plaintiff's Exhibit No. 5) which by various colors delineated the catagories into which he had divided the subject tract. His breakdown of the land values was as follows (R. 63-65):

490 acres improved pastures at $150.00	$73,500.00
235 acres woodlands and swamp south of Catahoula Creek at $80.00	18,800.00

35 acres campsite north of Catahoula Creek at $100.00	3,500.00
1055 acres woodlands north of Catahoula Creek at $60.00	63,300.00
50 acres home and campsite south of Catahoula Creek at $275.00	13,750.00
200 acres home and campsite south of Catahoula Creek at $200.00	40,000.00

Wooten was of the opinion that the quantity and quality of sand on the subject land was not such that could be economically mined for glass making purposes (R. 70).

Wooten rejected the Kottwitz to Gack sale because he didn't feel it to be an arms length transaction although he admitted the Gack land to be adjacent to the subject property (R.105).

He appraised the improvements by using the costs less depreciation method, thus giving same a value of $30,760.00 (See addenda).

The Government next brought W. J. Crecink who qualified as an engineer with the Planning and Design Section of the Mississippi State Highway Department (R.245). He testified that hearings were held on proposed Interstate 10 as early as May 29, 1964 but that the general public knew of the proposals as early as 1960 (R. 263).

The Government presented its next witness, Edwin E. Luper, who qualified as a geophysical expert (R. 275). His testimony concerned the drilling of certain holes across

the subject lands in an attempt to ascertain the quality and quantity of sand thereon. He introduced maps, grafts and lab reports (Plaintiff's Exhibits Nos. 12-22, inclusive). He described the overburden and type of sand (R. 279) of each of the samples taken from the borings and from the sand bars (R. 287). He stated that a testing lab ran analysis, both physical and chemical on the sand (R.294). He was of the opinion that the sand in place on the subject property was not suitable for the making of glass (R. 299, 323).

H. B. Phillips, an official of the Mississippi Testing Laboratory, was called on behalf of the Government (R. 327). His company performed screen and chemical analysis of material secured from the subject land (R. 329). He identified Plaintiff's Exhibit No. 18 as having been made by his company (R. 328).

H. L. Ladner, also an official of the Mississippi Testing Laboratory, was called by the Government. He identified Plaintiff's Exhibit No. 14 as being a report made by him on certain samples of materials taken from the subject land (R. 335).

Henry N. Toler, a consultant geologist was presented as a Government witness (R.354). In addition to oil and gas work, he stated he had had some experience in the examination for sand to be used in glass making (R.357). He reached the conclusion that the sand on the subject property contained too much heavy mineral material for the purpose of making glass (R. 366).

The next Government witness was Charles A. Olts (R. 366). He stated he understood the easement in question (R. 386) and described the subject tract (R. 389-392). Olts gave the following highest and best use,

together with values excluding timber and minerals: 210 acres within 1000 feet back from north bank of Catahoula Creek for campsite at $150.00 per acre, totaling $31,500.00; 360 acres within 1000 feet back from the south bank for campsite at $180.00 per acre, totaling $64,800.00; 615 acres back from the Texas Flat Road for homesite at $115.00 per acre, totaling $70,725.00; 880 acres of land lying more than 1000 feet from north bank of said creek as woodlands at $60.00 per acre, totaling $52,800.00 (R. 397). He valued the improvements at a total depreciated value of $45,430.00 (R. 399-401, inclusive) giving a grand total value before the imposition of the easement at $265,255.00. He gave the land the highest and best use as timberlands at $50.00 per acre after the imposition of the easement for a total "after" value of $103,250.00, and recommended just compensation in the sum of $162,000.00 (R. 398). In order to illustrate his division of the land, he introduced a map (Plaintiff's Exhibit No. 23).

Mr. Olts next explained that he had used the comparable sales method going into some 12 sales (R. 404-432). He further testified that any effect of Interstate 10 had on the subject property would be reflected in his sales (R. 434).

Olts did not use the Kottwitz to Gack sale (R. 439) as one of his comparable sales but on cross-examination, admitted that he had confirmed the sales price during a 1968 conversation with Kattwitz (R. 463). He stated he did not use this sale on lands adjacent to the subject property because he did not believe the buyer to have been fully informed (R. 464).

Government witness, C. T. Mansfield, stated he was an analytical chemist for R. J. Reynolds Industries (R. 619). He was called for the purpose of introducing a lab report of Mississippi Testing Laboratory (Plaintiff's Exhibit No. 14).

Lavern Walters was presented as a Government witness (R. 623) for the purpose of introducing another lab report of Mississippi Testing Laboratory (Plaintiff's Exhibit No. 18).

This concluded the Government's case.

The Defendant called as its first witness, Melvin Dovith, who, in 1921, was Chief of the Acquisition Branch of Real Estate Division, Mobile District Corps of Engineers (R. 628). He was questioned concerning the meaning of the subject easement (R. 632-637, inclusive) and his participation in the preparing of a gross appraisal of the entire project (R. 638-641).

The Defendant, Clay Calhoun, next took the stand in his own behalf (R. 652).

Calhoun was allowed to testify as to the amount of minable silica on his land (R.655). He sent samples of sand to two companies (R.666) and consulted a design engineer for building a silica plant (R. 667). He estimated two million tons of sand suitable for silica on the land; that he would produce 100,000 tons per year for five years with a minimum profit of $1.00 per ton for the produce with a net royalty to him over the five year period of $100,000.00 (R. 680, 681).

Calhoun testified that he accumulated the land with the idea of "developing" same

(R. 657). However, he farmed the lands for the next five years (R. 658). He did have a surveyor divide the property into five and ten acre plots (R. 660) but claimed he went no farther after the announcement of the project which is the cause of this taking (R.665).

Calhoun interpreted the easement as rendering his land completely useless so that the imposition of same amounted to taking his land in fee (R. 697, 704, 705). Although at the time he was making the plans to develop his property, Calhoun knew Interstate 10 was only in the proposal stage, he assented this to be a factor in the development process (R. 709).

Calhoun introduced and explained some 80 photograph slides showing different aspects of the land (Defendant's Exhibit No. 1).

The Commission offered to make a visual inspection of the land but after objection by Calhoun, none was made (R. 730).

Calhoun's opinion of the fair market value of his land before the imposition of the easement was: 2044 acres at $450.00 per acre, totaling $920,000.00; and 21 acres of potential homesite plus 21 acres of commercial use as a silica plant of a total of $100,000.00; thus a grand total of $1,020,000.00 (this figure included everything, or as Calhoun put it: "lock, stock and barrel"). He gave the land no value after the imposition of the easement (R. 731).

By way of comparable sales, Calhoun identified a map containing, among other things, the location of the sales he thought comparable (Defendant's Exhibit #12). He used the Kottwitz to Gack sale adjoining

property stating the sales price thereon to have been $306.25 per acre (R. 740).

Calhoun recited the sales of seven parcels of land which he considered comparable, however, much of his data concerning the same was hearsay (R. 742-746).

His testimony also included information concerning certain subdivisions in the neighborhood (R. 749-752) but he offered no data relative to development costs, sales costs, etc. for the development of said subdivision.

Mr. Calhoun advanced the theory that the announcement of the subject project adversely effected market value of properties in Hancock County, Mississippi (R. 754). In support of same, he offered certain newspaper articles, releases from the National Aero-Space Authority and others (R. 757). His opinion was that no one would want to go into the area (ie: his land) because of the danger factor (R.759).

As to the location of Interstate 10, this witness offered a map dated in 1966 which he said indicated the final location to be the same as the location in 1960 (Defendant's Exhibit 13). His opinion was that the general location of Interstate 10 caused his property to go up in value (R. 766).

The defense next called James Anslay who stated that he was a Civil Engineer (R. 838) and had, at the request of the Defendant, made certain borings to obtain samples from the subject land (R. 841). He estimated there was as much as 500,000 yards of white sand within an area shown on his map introduced as Defendant's Exhibit 17 (R. 846). He compared other waterfront properties with the subject tract as to elevation (R. 851).

Based upon a survey made by him, he stated the acreage on the subject property south of the creek to be 1027.8 acres (R.855).

At the request of his employer, the Defendant herein, he had drawn some study plans dealing with methods of subdividing the subject lands (R. 856). Some methods considered were 5 acre lots south of the creek (R. 858) and golf course for a recreational area north of the creek (R. 861).

C. C. Deano, a realtor residing in New Orleans, Louisiana next appeared for the defense (R. 880). He made a physical inspection of the subject lands (R. 882) and described the land (R. 884) as well as the improvements (R. 886).

His understanding of the subject easement was that it was equivalent to a fee taking (R. 888). He gave the highest and best use for the land for subdivision development (R. 888). By using the method of estimating reproduction costs and then deducting depreciation, he gave a total value of $65,417.00 to the improvements (See Addenda).

His land values before the imposition of the easement were as follows:

(a) 1018 acres between the Jordon River and Texas Flat Road for subdivision purposes at $500.00 per acre, or $509,000.00.

(b) 387 acres north of Jordon River in Section 28 and 29, [illegible]50.00 per acre, or $135,450.00.

(c) 640 acres north of Jordon River in Section 20, at $225.00 per acre, or $144,000.00 (R. 893).

Deano's total fair market value before the imposition of the easement, including minerals of $100,000.00 and all improvements, came to $954,000.00 (R. 894). He gave a fair market value to the land after the imposition of the easement at "zero dollars" and recommended just compensation of $954,000.00 (R. 897). He introduced a map (Defendant's Exhibit No. 22) showing the sales he believed to be comparable and proceeded to explain same (R. 899-914).

The defense presented E. B. Breazealle as an expert in land development (R. 985). Whereas, he has had vast experience in land development, most of his testimony was a recital of lands he had purchased and sold. His concept of the easement was rather confused (R. 997; 1001). His highest and best use of the subject lands was for resort property upon which he put a value before the imposition of the easement at from $350.00 to $365.00 an acre; the value after imposition of the easement was "nothing" (R. 999). He gave no value to the improvements.

The Defendant next made proffer concerning the amount of silica on the subject lands (Defendant's Exhibit No. 24). The trial testimony of Earl Hastings and Russel Le Blanc with regard to silica (Defendant's Exhibit No. 25) and the former testimony of Gary Smallwood (Defendant's Exhibit No. 26) were introduced by Defendant.

Defendant's next witness was Max Derbes who qualified as a real estate appraiser (R. 1024). He described the land (R. 1028). He described the improvements (R. 1032) and gave the total values of same, using replacement costs less depreciation (R. 1022-1038) at $71,200.00 (See Addenda).

Derbes used the comparable sales method in appraising the land giving data on some nine sales (R. 1039-1056) and gave the land the following values before the imposition of the easement: 1017.3 acres south of Jordon River at $400.00 or $406,920.00; 21 acres west end of subject property and on both sides of Jordon River for silica deposits: $100,000.00; 225.3 acres north of Jordon River to depth of 1300 feet at $350.00, or $78,855.00; 801 acres north of 1300 feet line north of river at $250.00, or $200,250.00. To these figures, he added the depreciated value of the improvements of $71,200.00 and arrived at a total "before" value of $857,225.00.

Derbes' value of the property after the imposition was $35.00 per acre, or $71,526.00, and he recommended just compensation in the amount of $784,964.00 (R. 1059).

To support his "after" value, he offered the sale of Bowers to Necaise (R.1060).

The Defendant, Calhoun, was recalled to the stand for the purpose of reiterating his costs in the defense of this suit which he claimed should be part of his just compensation (R. 1110). Calhoun offered for identification only a sheet containing his expense items (see Defendant's Exhibit 29 for identification). Calhoun then proceeded to offer rebuttal testimony relative to certain comparable sales.

At this point, testimony for both sides was completed. Both the United States and the Defendant asked for and received two months in which to prepare and submit to the Commission memoranda in support of their sides in the matter.

Later, the Commission reconvened and heard oral argument (R. 1121-1180) at which time both the United States and the Defendant introduced copies of their memoranda, same being marked as exhibits (see Plaintiff's Exhibit 1 and Defendant's Exhibit 1 to Argument).

Testimony concerning the improvements was given by Wooten (R. 48), Olts (R. 399), Derbes (R. 1022) and Deano (R. 880). A breakdown of their depreciated values is attached hereto as an addenda. The Commission finds as a matter of fact that the improvements had the following value: main residence - $16,900.00; caretaker's residence - $3,000.00; barn and sheds - $12,000.00; wells (2) - $3,000.00; dog yard - $750.00; telephone line - $650.00; barbecue pit - $250.00; 5 goat sheds - $200.00; watering pool - $350.00; duck pond - $200.00; patio and shower - $900.00; cattle chute - $200.00; or a total value of $38,400.00.

The Commission finds that the fences, gates, shell roads and landscaping were not taken by the easement but should have been reflected in the land values.

The Commission finds that the Government did not take the concrete bridge pilings and that same are not improvements as would be compensable.

It is the understanding of the Commission that the imposition of the subject easement on the captioned lands does not take either minerals or timber. After having carefully considered the testimony of the witnesses Luper (R. 274, 341), Phillips (R. 327), Ladner (R. 334), Toler (R. 354), Mansfield (R. 619) and Ansley (R. 837), the

Commission finds that there was no marketable silica on the subject property as of the date of taking. Also, the Commission is of the opinion that silica, being crystalline silicon dioxide and the principal constitutent of quartz and sand, is a mineral, and as such, is not taken by the imposition of the easement on the subject land.

Mineral - a natural occurring homogeneous substance formed by inorganic processes and having a molecular structure usually expressed in crystalline form. Funk and Wagnall, Standard Dictionary (1959).

The Commission is of the opinion and so finds that the proposed location of Interstate 10 did not touch the subject lands and did not affect the value of same.

In the consideration of the land values, the Commission has not only considered the testimony of live witnesses but also the written testimony of parties who have testified in previous hearings in this matter such as Hines (Defendant's Exhibit 19), Turner (Defendant's Exhibit 20), Smallwood (Defendant's Exhibit 26), and the deposition of Margot Gack (Defendant's Exhibit 21).

As to the highest and best uses of the land, the Commission is cognizant of the possibility of considering the land as an entire piece when determining value. However, in view of the fact that the owner testified that he accumulated the land for development purposes (R. 657) plus the action of Defendant's principal witness, Derbes, in dividing the land into different catagories, leads the Commission to the inescapable conclusion that

to break down the tract in such fashion would be the most accurate manner in which to determine just compensation. Accordingly, the Commission finds as a matter of fact the highest and best uses of the lands before the imposition of the easement to be as follows:

(a) North of river

235.8 acres of campsite (to depth of 1300 feet north of river)
801 acres of timberland (north of 1300 feet from river line)

(b) South of river

252.6 acres of camp and homesite
500 acres of pasturelands
235 acres timberlands

The Commission finds as a matter of fact that the highest and best use of the lands after the imposition of the easement was for timberlands.

As to fixing the values on the above catagories, the Commission is of the opinion that the Kottwitz to Gack sale of property adjacent to the subject lands is the best criteria. This 1961 sale of 240 acres grossed $70,000.00 with $62,800.00 being allotted to the land. The average per acre price was $261.67 which the witness Derbes adjusted upward for time to $290.00. The Commission finds as a matter of fact that the Gack sale reflected a $200.00 per acre price of the 235.8 acres of campsite north of the Jordon River, $350.00 per acre for the 252.6 acres of camp and homesite south of the river, $200.00 per acre for the 500 acres of pasture-land south of the river, and $80.00 per acre for the 235 acres of timberland south of the

river as well as the 801 acres of timberland north of the river.

The Commission finds as a matter of fact that the Bowers to Necaise sale reflects, with the proper adjustments, an after value of $50.00 per acre.

CONCLUSIONS OF LAW

The Commission concludes from the evidence presented it, that the subject lands had the following values:

Fair market value before the imposition of the easement:

(a)	North of river	
	235.8 acres campsite at $200.00	$ 47,160.00
	801 acres timberland at $80.00	64,080.00
(b)	South of river	
	252.6 acres camp and homesite at $350.00	88,410.00
	500 acres pastureland at $200.00	100,000.00
	235 acres timberlands at $80.00	18,800.00
		318,450.00
(c)	Value of improvements	38,400.00
Total		356,850.00

Fair market value after the imposition of the easement:

2064.6 acres timberland at $50.00	103,230.00
JUST COMPENSATION	$253,620.00

WHEREFORE, the Commission would recommend unto the Court that the owner be paid the sum of $253,620.00 for the taking of his improvements and for the imposition of the easement on his lands.

RESPECTFULLY SUBMITTED this, the 23rd day of April, 1971.

s/Robert G. Nichols Jr.
ROBERT G. NICHOLS, JR.

s/W. W. Webre
W. W. WEBRE

s/Harry Joachim
HARRY JOACHIM

CERTIFICATE

This is to certify that the undersigned, as Chairman of said Eminent Domain Commission, has this day mailed a true and correct copy of the foregoing Findings and Conclusions of Eminent Domain Commission to the Honorable Robert Hauberg, United States Attorney, Federal Building, Jackson, Mississippi, to Honorable Walter J. Phillips, Attorney at Law, Bay St. Louis, Mississippi, and to Honorable George Morse, Attorney at Law, P. O. Box 100, Gulfport, Mississippi, via United States Mail, postage prepaid.

This, the 23rd day of April, 1971.

s/Robert G. Nichols Jr.
CHAIRMAN

ADDENDA

	WOOTEN	OLTS	DERBES	DEANO	TURNER
Main Residence	$ 15,600.00	16,700.00	16,900.00	17,432.00	17,784.00
Caretaker's House	2,100.00	2,950.00	4,300.00	5,244.00	4,714.00
Barn with sheds	8,200.00	11,200.00	12,885.00	17,248.00	
Wells (2)	3,120.00	2,875.00	2,600.00	3,600.00	
Dog yard	765.00	NV	NV	NV	
Telephone line	650.00	NV	NV	NV	
Barbecue pit, shower area	250.00	350.00	340.00	500.00	(bal. of improvements- $56,646.00)
Goat sheds (5)	75.00	165.00	200.00	N	
Fences and gates	NV	900.00	12,886.00	18,048.00	
Shell roads	NV	NV	13,830.00	16,290.00	
Watering pool	NV	300.00	625.00	600.00	
Duck pond	NV	200.00	400.00	400.00	
Patio at river	NV	675.00	900.00	1,125.00	
Cattle chute	NV	700.00	200.00	NV	
57 bridge pilings	NV	NV	4,134.00	4,000.00	
Landscaping	NV	NV	NV	NV	
Totals	$ 30,760.00	45,430.00	71,200.00	65,417.00	83,196.00

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI, SOUTHERN DIVISION

UNITED STATES OF AMERICA

VS.

2064.60 ACRES OF LAND, MORE OR LESS, SITUATE IN HANCOCK COUNTY, MISSISSIPPI, AND CLAY CALHOUN

CIVIL ACTION
NO. 2670
TRACT 118-E

AMENDED FINDINGS AND CONCLUSIONS
OF EMINENT DOMAIN COMMISSION

Comes now, Robert G. Nichols, Jr., W.W. Webre and Harry Joachim, the duly appointed Commissioners acting herein under an Order of Reference issued on June 14, 1965, and having had this case recommitted to them by Order of Walter L. Nixon, United States District Judge, said Order being dated June 15, 1971, does hereby amend the Findings and Conclusions of Eminent Domain Commission filed herein on April 23, 1971, as follows, to-wit:

FINDING OF FACT

The Commission finds as a matter of fact the highest and best uses of the lands before the imposition of the easement to be as follows:

(a) North of the River

255.8 acres of campsite (to a depth of 1300 feet north of the river)

801 acres of timberland (north of 1300 feet from river)

(b) South of the River

272.8 acres of camp and homesite

500 acres of pasturelands

235 acres of timberlands

With regard to the inquiries directed to the Commission by the Court in its said Order of June 1, 1971, the Commission erred in that it failed to include 40.2 acres in the "before" value in its Findings of April 23, 1971. This came about by the Commission refusing to accept the classification of Derbes of acreage on both sides of the river designated by him as silica deposits (R. 1039-1056). The Commission inadvertently failed to re-add this acreage into the total "before" value as campsite and homesite acreage.

As to using the depth back from the Jordan River in ascertaining the catagories allotted to the land north of the said river, the Commission accepted the acreage and the 1300 feet designation as established by defendant's witness, Derbes (R. 1028, 1058). The Commission was of the opinion that there was about the same number of acres south of the river which was amenable to camp and homesites (actually the Commission allowed 27 acres more on the south side). The Commission construed Mr. Derbes testimony to mean that these catagories would extend to a maximum of 1300 feet back from the river banks and not that an imaginary line would be drawn paralleling the meandering of that stream.

The Addenda has been amended so as to eliminate certain errors in totals.

CONCLUSIONS OF LAW

The Commission concludes from the evidence presented it, that the subject lands had the following values:

I. Fair market value before the imposition of the easement:

(a) North of the river:

255.8 acres campsite at $200.00	$ 51,160.00
801 acres timberland at $80.00	64,080.00

(b) South of the river:

272.8 acres camp and homesite at $350.00	95,480.00
500 acres pastureland at $200.00	100,000.00
235 acres timberland at $80.00	18,800.00
	329,520.00

(c) Value of improvements 38,400.00

Total "Before" Value $367,920.00

II. Fair market value after the imposition of the easement:

2064.6 acres timberland at $50.00	103,230.00

JUST COMPENSATION $264,690.00

WHEREFORE, the Commission would recommend unto the Court that the owner be paid the sum of $264,690.00 for the taking of his

improvements and for the imposition of the easement on his lands.

Except as amended herein, the Commission adopts its Findings and Conclusions as filed herein on April 23, 1971.

RESPECTFULLY SUBMITTED this, the _____ day of November, 1971.

ROBERT G. NICHOLS, JR.

W. W. WEBRE

HARRY JOACHIM

CERTIFICATE

This is to certify that the undersigned, as Chairman of said Eminent Domain Commission, has this day mailed a true and correct copy of the foregoing Amended Findings and Conclusions of Eminent Domain Commission to the Honorable Robert Hauberg, United States Attorney, Federal Building, Jackson, Mississippi; to Honorable Walter J. Phillips, Attorney, Bay St. Louis, Mississippi; and to Honorable George Morse, Attorney, P.O.Box 100, Gulfport, Mississippi, via United States Mail, postage prepaid.

This, the _____ day of _____, 1971.

CHAIRMAN

ADDENDA

	WOOTEN	OLTS	DERBES	DEANO	TURNER
Main Residence	$ 15,600.00	16,700.00	16,900.00	17,432.00	17,784.00
Caretaker's house	2,100.00	2,950.00	4,300.00	5,244.00	5,265.00
Barn with sheds	8,200.00	11,200.00	12,885.00	17,248.00	
Wells (2)	3,120.00	2,875.00	2,600.00	3,600.00	
Dog yard	765.00	NV	NV	NV	
Telephone line	650.00	NV	NV	NV	
Barbecue pit, shower area	250.00	300.00	340.00	500.00	(bal. of improvements $58,646.00)
Goat sheds (5)	75.00	165.00	200.00	NV	
Fences and gates	NV	900.00	13,886.00	18,048.00	
Shell roads	NV	NV	13,830.00	16,290.00	
Watering pool	NV	300.00	625.00	600.00	
Duck pond	NV	200.00	400.00	400.00	
Patio at river	NV	675.00	900.00	1,125.00	
Cattle chute	NV	700.00	200.00	NV	
57 bridge pilings	NV	NV	4,134.00	4,000.00	
Landscaping	NV	NV	NV	NV	
Totals	$30,760.00	36,965.00	71,200.00	84,487.00	81,695.00

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI, SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

vs.

CIVIL ACTION
NO. 2670(C)

2,431.4 ACRES OF LAND,
MORE OR LESS, SITUATE
IN HANCOCK COUNTY,
STATE OF MISSISSIPPI
AND CLAY CALHOUN, ET AL.,
Defendants

TRACT NO. 118-E

ORDER CONFIRMING EMINENT DOMAIN LAND COMMISSION'S AWARD AND ORDERING DEPOSIT OF DEFICIENCY

This cause having come on for hearing by the Court on the landowner's objections to the Land Commission's April 23, 1971 Findings and Conclusions and the landowner's objections to the Land Commission's November 30, 1971 Amended Findings and Conclusions, and the Court having carefully considered the argument of counsel, the transcript of hearing, exhibits, pleadings and other memoranda in this case is of the opinion and find that the award of just compensation of $264,690.00 as recommended by the Land Commission's aforesaid Amended Findings and Conclusions should be affirmed. The Court therefore is of the opinion and finds that the Commission's aforesaid Findings and Conclusions as amended and the suggested award of just compensation as aforesaid is hereby approved and confirmed, all in accordance with this Court's June 27, 1972 Opinion.

It appears unto the Court that the sum of $253,620 plus all interest due thereon has been distributed to the landowner herein as is noted in this Court's August 3, 1971 Order Amending Court's July 30, 1971 Order of Distribution. As to Tract No. 118-E, there are no funds now on deposit in the Registry of this Court and therefore there exists a deficiency of $11,070.00 plus interest thereon at the rate of 6% from April 8, 1963, date of condemnation herein, until date such sum would be deposited in the Registry of this Court.

It is, therefore, Ordered and Adjudged that the April 23, 1971 Findings and Conclusions, as amended (November 30, 1971), of the Eminent Domain Commission is hereby approved and affirmed and the landowner herein is hereby awarded the total sum of $264,690.00, of which sum $253,620.00 plus interest as aforesaid has heretofore been paid to the landowner. The United States is hereby Ordered and Directed to deposit in the Registry of this Court the deficiency sum of $11,070.00 plus interest at the rate of 6% from April 8, 1963, date of condemnation, to the date of deposit of said sum.

The interest to the estate contained herein is hereby vested in the United States of America, free and clear of any liens whatsoever.

After the aforesaid deficiency has been deposited, distribution will be made by further order of this Court.

ORDERED AND ADJUDGED this 29th day of June, 1972.

s/HAROLD COX
UNITED STATES DISTRICT JUDGE

Rule 71A.

CONDEMNATION OF PROPERTY

(a) *Applicability of Other Rules.* The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) *Joinder of Properties.* The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) *Complaint.*

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) Process

(1) *Notice; Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its

service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of Notice.*

(i) *Personal Service.* Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

(ii) *Service by Publication.* Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached

a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(d) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) Amendment of Pleadings. Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) Substitution of Parties. If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be

served upon a person not already a party, service shall be made as provided in subdivision (d) (3) of this rule.

(h) **Trial.** If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) **Dismissal of Action.**

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any

part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(d) Effect. Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) Deposit and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) Costs. Costs are not subject to Rule 54(d).

Added April 30, 1951, eff. Aug. 1, 1951, as amended Jan. 21, 1963, eff. July 1, 1963.

APPENDIX "G"

The perpetual easement on the subject land in favor of the United States provides: "The estate taken for said public uses in the hereinafter described Tract 118-E is a perpetual and assignable easement for the establishment, maintenance, operation and use of a restricted area in, on, across and over the land hereinafter described as Tract 118-E consisting of the right to prohibit human habitation or human occupancy of dwellings and other buildings, and the right to prohibit the construction of dwellings and other buildings susceptible of being used for human habitation or human occupancy; together with all right, title, and interest in and to the dwellings and other buildings now situated on the tracts last above specified and which are susceptible of being used for human habitation or human occupancy, including the right to demolish, remove, relocate, or leave in place said dwellings and other buildings; the right to post signs indicating the nature and extent of the Government's control; and the right of ingress and egress over and across said land for the purpose of exercising the rights set forth herein; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines; reserving, however, to the landowners, their heirs, executors, administrators, successors and assigns all right, title, interest, and privilege as may be used and enjoyed without interfering with or abridging the rights, title, and interest hereby taken for said public uses."

APPENDIX "H"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NUMBER 2670

UNITED STATES OF AMERICA

PLAINTIFF

V.

2064.60 ACRES OF LAND, MORE OR LESS, SITUATE IN HANCOCK COUNTY, MISSISSIPPI, AND CLAY CALHOUN TRACT NO. 118-E

DEFENDANTS

APPEARANCES:

MESSRS. ROBERT E. HAUBERG and KELLY TRAVIS, P. O. Box 2091, Jackson, Mississippi;

For the Plaintiff.

HON. GEORGE MORSE, P. O. Box 100, Gulfport, Mississippi;

HON. WALTER J. PHILLIPS, Bay St. Louis, Mississippi;

For the Defendants.

BE IT REMEMBERED that on, to-wit: December 9, 1968, the above styled and numbered cause came on for hearing before the HONORABLE WILLIAM HAROLD COX, United States District Judge for the Southern District of

Mississippi, in the Jackson Division, at Jackson, Mississippi, when the following proceedings were had and entered of record:

BY MR. HAUBERG:

Court please, there have been set for this morning the petition to show cause on behalf the Clay Calhoun claims in the Civil Action Number 2670, Southern Division, in connection with some notice to take the deposition of Emmett V. Thomas. Subsequent to the filing of the petition, Your Honor, we learned that notice had also been served on Mr. Weber, the other commissioner, to take his deposition tomorrow as well, and although our petition did not include him because we did not know at the time I think we could determine both issues at the same time and if permissible we would make an oral request that Weber also be included in consideration of that particular motion.

BY THE COURT:

When is his deposition to be taken?

BY MR. HAUBERG:

Tomorrow as well. We received the notice of the taking of the deposition this morning, Your Honor, and we did not know of the taking of them prior to that time except on telephone call that we received on I believe late Thursday afternoon, and of course the government did file its petition but at that time we knew only of Emmett V. Thomas scheduled deposition.

BY THE COURT:

What do you say about that?

BY MR. MORSE:

Your Honor, we had prepared and would submit to the Court a response on behalf of the landowners sworn to by Mr. Phillips and myself with respect, is the Court inquiring now about the deposition of Weber?

BY THE COURT:

Yes, this other fellow, is he Weber?

BY MR. MORSE:

Yes sir, Wilson Weber. We did notice both of them and sent the notices out at the same time but its perfectly understandable, same principles will govern both witnesses.

BY THE COURT:

All right, the motion then of the government to amend by including Wilson Weber, is that his name.

BY MR. MORSE:

Wilson Weber, yes sir.

BY THE COURT:

Wilson. I think I must know him by his initials.

BY MR. MORSE:

W. W.

BY THE COURT:

W. W. Weber is sustained.

BY MR. HAUBERG:

* * * * *

when we do of course we file the normal objections.

BY THE COURT:

Well, gentlemen, it seems to me that we are confronted here only with the legal question of the propriety or not of taking the depositions of these commissioners under the circumstances and I will hear from you, gentlemen.

BY MR. MORSE:

Your Honor, I conceded at the outset that this is an unusual proceeding but I think that the facts set forth in our response to show cause set out unusual circumstances.

BY THE COURT:

What is that?

BY MR. MORSE:

The unusual circumstances that we allege are that the Commission did not decide this case, that they right after it was tried and while instruction, rather petition pending before you for additional instructions to the Commission they the last sheet of the opinion was prepared, it was styled conclusions of law. It set forth the summary of the award. It was signed in blank by the three commissioners, and then Mr. Nichols according to our information later prepared solely and completely without consulting with

the other two commissioners the findings of fact and that when this was served upon us in September of this year neither Mr. Thomas nor Mr. Weber knew that the case had been decided and both of them expressed surprise to me when they told me, when I told them it had been decided, so we say that the Commissioners did not follow the Court's instructions, did not follow their responsibility as set out in Murts and under the rule by which you appointed this Commission, that they became as referred to in the Murts case a free wheeling bribunal. Now the significance of all of this, Your Honor, is that after the case was tried there was still pending before you a request for additional instructions and you gave us some additional instructions; the crucial one being that no land is unique and each must be considered, each place must be considered separately. This was one of the largest tracts in the test site which was used for estate purposes, 2,000 acres about, and we thought that it was unique, that if there were any formula or rule that the Commission had adopted through having tried many of these cases that they should disregard that formula and try the Calhoun case as a unique case. They decided it, the award, the fair compensation before they ever got that instruction from you. We had a rehearing on July the 22nd, 1968. Keep in mind we say and charge that they decided the case before the rehearing. We asked the Commission to reconsider an effort on our part to introduce the testimony of one Ed Turner who testified in the former trial. We had tried to do that in the trial in chief and Mr. Nichols had ruled against us. He reconsidered on our motion for rehearing and this time admitted Mr. Turner's testimony extracted from the record in the former trial.

BY THE COURT:

Its my recollection that this matter was pending before the Commission when there was pending before this Court a motion for additional instructions and I believe I suggested that they hold it up to await these additional instructions. I believe I made that oral request.

BY MR. MORSE:

Yes sir, you did.

BY THE COURT:

Of Mr. Nichols so that he would see whether or not his final product complied with all of the requirements of the amended instructions and I think that that may have occasioned some of the appearances here, I don't know.

BY MR. MORSE:

I think that's correct, Your Honor, but I think at the time we had the hearing in April of 1968 there was still pending a request for additional instructions that had not been decided by the Court.

BY THE COURT:

I didn't give you but one additional instruction I don't believe, one set of additional instructions.

BY MR. MORSE:

That's right, one set, and that was given after the case was tried.

BY THE COURT:

Oh yes, sure.

BY MR. MORSE:

Yes sir, after it was tried.

BY THE COURT:

Was it filed, it was filed after the case was tried.

BY MR. MORSE:

Yes sir, that's right.

BY THE COURT:

Sure.

BY MR. MORSE:

Now what we say, Your Honor, on information that we believe to be true is that the case was actually decided before the supplemental instructions were received by anybody and that the findings of fact was solely the product of the Chairman without any consultation whatever with the other two Commissioners.

BY THE COURT:

The bothersome question now, I am not concerned about the convenience or inconvenience of any one of the commissioners, matter of fact if any of them are disposed as they some of them appear apparently to be to be so loquacious I think they ought to be drilled, but the question that bothers me is as to the propriety of a court commission being interrogated about how they arrived at

their conclusions even.

BY MR. MORSE:

We have two cases---

BY THE COURT:

If you can do that you can go in and delve into jury questions and I doubt that very many of us would like to face some of the formula that they use and would like to give approval to it. I question the propriety of that and then the Judge when he tries a case if you can interrogate these people you can interrogate the Judge and question his wisdom and his specious reasoning.

BY MR. MORSE:

I wouldn't go that far, Your Honor, I am not suggesting we do anything like that.

BY THE COURT:

We are not bothered with that right here but we are right at the threshhold of it. You are dealing with an agent of this Court who are acting as triers of the facts and judges of the law as an agency of this court and if you can do that you can come here and ask me to tell you why I reach some of the strange conclusions I reach sometime maybe.

BY MR. MORSE:

Well, Your Honor, let me see if I can, this problem, this question involves me too and I think there's an answer to it. In the Murts case the Supreme Court of the United States distinguished between a jury and a commission and said a jury until it retires

sits under the direct supervision of the judge who rules on the admissibility of evidence, who sees the witnesses are properly qualified as experts and who polices the entire hearing keeping it within bounds. Then in due course the judge instructs the jury on the law answering any inquiries its members may have on the law. The jury is under surveillance from start to finish and subject to judicial control answers its general verdict the land is worth so many dollars and not overturned for lack of particularized finding. Then you distinguish it, the Court does. The Judge who uses commissioners, however, establishes a tribunal and they become freewheeling taking the law from itself unless subject to close supervision. Now there are two cases that we have found, one a Virgin Island case, Third Circuit I believe it is, in which the Court there appointed land commissioners to try eminent domain case. The findings of fact conclusions of law of the commission were unsatisfactory so both the government and the landowner in this instance asked the commissioners by motion directed to the court asked that the commissioners expand upon their opinion and the Court felt that they should do it and asked and directed the commissioners to file supplemental conclusions, findings of fact and conclusions of law, and then the Court propounded interrogatories to these commissioners and asked them to tell the Court how they reached, what evidence they accepted, what they rejected, and their answers were very unsatisfactory according to the Court of Appeals decision here. The Court also required answers to a number of interrogatories directed toward ascertaining what evidence the commissioners relied upon, the manner in which they arrived at their valuation. In due course the commissioners filed an amended report in support of findings responding to all

the court's interrogatories. The amended report did not alter any of the prior valuation. After another round of objections by the government and the property owners and a lapse of almost a half year the District Court entered an order which overruled all parties objections, affirmed and adopted the commissioners amended report, and the Third Circuit commenting on this said that the interrogatories were proper but they weren't much help to the Court. The other case where a master has been interrogated by interrogatories is a Fifth Circuit case, a very recent one, in which Judges Brown and Coleman and District Judge sitting by designation---

BY THE COURT:

What circuit is that?

BY MR. MORSE:

Fifth.

BY THE COURT:

Fifth.

BY MR. MORSE:

Yes sir. This is the case of Fulton National Bank versus Tate, 1966 case. This is not a lands case but this is an instance where the court appointed a master, of course same principles would apply here, and in that case the Court, the Fifth Circuit, commenting said the original report was objected to by the bank particularly on the ground that the master had erroneously placed the burden of proof upon it and the District Court then specified four questions of law and thirty-four questions of fact and

resubmitted the case to the master for his answers. Then in commenting on that procedure in the footnote the Fifth Circuit said though the District Court's resubmission of the case to the master by use of method for passing on exceptions to a master's report it turns out to have been excellent, wait a minute, I misread that, Your Honor. Though the District Court's resubmission of the case to the master by use of specific interrogatories is an unusual method for passing on exceptions to the master's report it turns out to have been excellent. It has the distinctive advantage of informing the District Court and now this Court of precisely what the master found together with precisely legal holdings on such facts. Now in two instances here, the Court of Appeals decisions we have cited to the Court, they have said that interrogatories propounded by the Court to the master or commissioners is perfectly proper and the Fifth Circuit says its an excellent idea. We take one step beyond that. We filed a motion for rehearing in this case, noticed it for hearing in September of this year, attached an affidavit to it, my affidavit of the facts that I have now related to the Court, had it set for hearing before Judge Nixon and the government attorneys couldn't be there so they got it continued. This case is now set before Judge Nixon next Tuesday, tomorrow, on exceptions. We don't have the transcript here. I have asked Judge Nixon to continue the case because I didn't think a hearing would be very meaningful without the transcript and he told me he couldn't do it, so we seem to be going backward in this lawsuit instead of forward, but one thing I wanted to---

BY THE COURT:

He told you what?

BY MR. MORSE:

He told me he couldn't do it.

BY THE COURT:

Couldn't continue it.

BY MR. MORSE:

Yes sir, he said he didn't think he would ever get them disposed of if he did. I really don't know if he is aware of what he faces here because we---

BY THE COURT:

I will talk to Judge Nixon about that. I don't see how he could be given very much of a meaningful hearing without the transcript and I do know that this lady has been overworked, so much so its not just a request but its an order that she not be hired in any other cases and I want that transmitted to all of these real estate commissioners to let her catch up with her work. It seems to me that we are confronted with this sort of situation here. You have got a commission here to fix the awards in these cases of just compensation. We have got two real estate people who know very little, if anything, about law, and that was the reason that I appointed Mr. Nixon as, Mr. Nichols as Chairman because he is an experienced lawyer in this field to handle the legal end of it, so its not surprising to me that he does all of the paperwork in the case, that was sort of expected, because I doubt that either one of these realtors would have any idea about how to make a report to the Court.

BY MR. MORSE:

I agree with that, Your Honor, and we are not charging these people with any wrongdoing, just missing the mark. I say that they have an affirmative responsibility to sit down and say why are we not going to take Mr. Turner's testimony as being fair and accurate, I think he is a good appraiser and I don't take the government's appraiser, I won't accept that, and hash that question out and that was not done and that is what we charge.

BY THE COURT:

Of course how they go about their deliberations and making their decisions I don't think that is a matter that can be inquired into. That is the jury part of the matter. Sometimes they do it on some real strange basis. They may have done so here. They were given guidelines and the Court thinking that probably they should be drawn out to some extent in their answers after objections were filed I started a policy, its not just in this particular case but in every case, the policy that the Court has been to require the real estate commission to respond to the objections and they have done that in this case and that is an inquiry in and of itself addressed to them which might treat it or consider it as interrogatories by the Court. I wanted to see what their answers were in these cases to those particularized objections and criticisms of their report and its strange to find that all of them have signed that response to your criticism and now you say you like to put on the testimony of two of these fellows to impeach their own report and I don't think you can do that.

BY MR. MORSE:

Your Honor, the only actions are inconsistent Weber signs the conclusion of law. The next thing he hears about the case is its been decided. The next thing he files is in the nature of a dissent, so we have got Weber deciding one way one time and subsequently another.

BY THE COURT:

Well, of course I question the propriety of that very strongly, but if he has made a report to the Court and has signed that report he is probably in contempt of court for making a supplemental report to try to disparage a report that he has made and I want to look into that. I think Mr. Weber ought to be called on to explain any such unusual action as that and I think I shall suggest that he is in contempt of court.

BY MR. MORSE:

Well, all of these things, Your Honor, we felt like unusual circumstances, seems that this case can't proceed without some digression one step forward and two backward and I am as weary of it as anybody I am sure, but we felt like that to protect Calhoun's rights in this that this should be developed and in the alternative in our response to show cause order we have suggested that the Court undertake this investigation because I think it would be perfectly proper under the two cases we have cited in our response to show cause for the Court to make any inquiry it wanted with respect to any of the facts that we necessarily had to charge on information and belief but we had very strong grounds to believe it, and certainly that would be far superior I suppose for the Court to do it than us to take depositions.

BY THE COURT:

That's what we are here on this morning is the question of depositions and of course Judge Nixon was doing what he has been requested to do and that is to dispose of all of these real estate matters and I can't try to barge in and tell him what to do or try to give him any so called guidelines about what he will do, but I do want to talk to him about this matter and in the light of the hearing here I don't think that you have got any right to take depositions of these other two commissioners as objectionable as I find Mr. Weber's conduct and his so called report. I don't know who he got to write that up. Did he get you to write it?

BY MR. MORSE:

No sir, I did not write it, Your Honor. He consulted, not consulted, I talked to him on the telephone about it and he said that he did not agree with the commissioners' report. He said he didn't even know the thing had been decided.

BY THE COURT:

He signed the report.

BY MR. MORSE:

He signed a sheet in blank which subsequently became a part of the report that's true, and then he came along after in September when it was decided and filed what I considered to be in the nature of a dissent.

BY THE COURT:

You mean he signed a blank page with his name on it knowing that they were going to put

a report on that and call that a report to this Court.

BY MR. MORSE:

All three of them did.

BY THE COURT:

I think he ought to be locked up if he did any such thing as that. I regard that as most contemptous and I intend to pursue that. If he did any such thing as that I don't think he ought to be allowed to run loose.

BY MR. PHILLIPS:

May I make a statement to the Court?

BY THE COURT:

Yes sir.

BY MR. PHILLIPS:

I think this is where the confusion lies, if the Court please. It was my understanding that prior to the issuance of new instructions to the Commission that this matter had been discussed and the question of the Turner appraisal was not before the Commission because at the original hearing, the April hearing, the Turner report or the Turner testimony was not deemed to be admissible in evidence. Then its my understanding that the Commission had decided on values and conclusions of law based upon the situation as it existed at the April hearing. Subsequent to that time the Court issued new instructions, the Commission accepted the Turner report along with some other things. Then the same report that had been given before

and had been signed, the commissioners had signed the report based upon the evidence of April the 15th. Subsequent to the report date of signing these other matters transpired. As I understand it it was Commissioner Weber's opinion or understanding that they would meet again in light of this new evidence that his opinion had been changed in the light of the new evidence and he thought that there was to be a subsequent report or meeting made by the Commission. Then, utilizing the same signatures, the date, and I think Mr. Calhoun himself determined that the date had been erased, it was a May date or a June date had been erased and a September date had been substituted, and Mr. Weber when he got his report noted that and expressed an intention to take into consideration a higher land value as presented by the, I think it was the Turner report, of the land north of the river. He then subsequently got in touch with according to my information with Bob Nichols. Then Bob had suggested dissenting report. Now this is the information that I have just received. Then this dissenting report was signed by Weber dissenting from that original report stating that he had intended to sign the original report based upon the evidence as it was presented in the April hearing, not taking into consideration the subsequent evidence, that the subsequent evidence led him to believe that the land values north of the river were higher. Now that, I think, is the situation.

BY THE COURT:

I don't know what kind of local pressures may have been brought on Mr. Weber, but anybody who is fit or competent or qualified to sit as a Commissioner of this Court has got to be impervious to any kind of

pressure from anybody, and I am not mindful of any disagreement any of those gentlemen may have had. I don't understand that there has been the slightest internal turmoil or disagreement between them and I just don't understand this kind of a procedure and I

* * * * * *

and I certainly know of no pressure that has brought on Mr. Nichols, on Mr. Weber. The information I received as to his dissent was obtained through or from Mr. Nichols when I was discussing another matter totally unrelated to this with him, so my main source of information was that from Mr. Nichols.

BY THE COURT:

Do you know who prepared his dissent?

BY MR. PHILLIPS:

Sir?

BY THE COURT:

Who prepared his dissent?

BY MR. PHILLIPS:

I have no idea sir.

BY MR. MORSE:

I don't know either, Your Honor.

BY THE COURT:

See, that looks like he was in some kind of strange dilemma as with the Commission itself in going out and getting outside counsel,

I assume that he would use outside counsel, to write a dissent like that instead of taking the matter up and trying to reconcile his differences with the commission, yet everytime the opportunity is afforded he signs a report that shows unanimity of action which is a positive representation to this Court that that is a unanimous agreement, and then for him to come along with some kind of shenanigan like an outside report I definitely think he is in trouble here and I don't intend to let this matter rest because I am not going to have a Commissioner that's talking out of both sides of his mouth. He better learn to talk right out of the middle of his mouth with me. All right, Mr. Hauberg.

BY MR. HAUBERG:

Court please, in response to just two or three---

BY THE COURT:

You might tell him that Mr. Phillips because maybe he is not in communication with the other part of his commission so he better get that message.

BY MR. PHILLIPS:

Yes sir.

BY MR. HAUBERG:

Court please, counsel made the argument that ----

BY THE COURT:

Incidentally, I don't want him used in any other cases until that matter is

completely clarified to my entire satisfaction. If you have got any matter up down there that can't be handled without Mr. Weber we just won't handle it. I will give consideration to removing him. Looks like he is causing more trouble

* * * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NUMBER 2670

UNITED STATES OF AMERICA

PLAINTIFF

V.

2064.60 ACRES OF LAND, ETC.

DEFENDANTS

COURT REPORTER'S CERTIFICATE

I, William A. Davis, an Official Court Reporter in and for the United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing 50 pages contain a complete and accurate transcript of the proceedings in this cause had on the date therein set forth as recorded and transcribed by me or under my supervision to the best of my skill and ability.

Witness my signature this 27th day of April, 1969.

s/William A. Davis
Official Court Reporter

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No. 73-357

FILED
OCT 2 1973
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

2,431.4 ACRES OF LAND, MORE OR LESS, SITUATED IN HANCOCK COUNTY, MISSISSIPPI, AND CLAY CALHOUN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This condemnation proceeding was instituted by the United States in 1963 to acquire a perpetual easement upon petitioners' land prohibiting human habitation on the land because of a nearby rocket testing facility. The case was first submitted to a jury, which returned a verdict of $175,000 as just compensation. On petitioners' appeal the order confirming the verdict was reversed and the case was remanded for a new trial. *Calhoun* v. *United States,* 384 F. 2d 180 (C.A. 5). On remand, the case was submitted to a commission pursuant to Rule 71A(h), Fed. R. Civ. P., which returned an award of $195,620. The district court set aside that award and remanded the case to the commission for a new hearing, after which the commission awarded $253,620 as just compensation and subsequently amended

the award to $264,690. The latter award was approved by the district court, and the judgment was affirmed by the court of appeals. 473 F. 2d 1389.

Petitioners' basic contentions are that they were denied a jury trial on remand and that the compensation awarded them is inadequate. Neither contention presents an issue warranting review by this Court. As this Court stated in *United States* v. *Reynolds,* 397 U.S. 14, 18, "* * * it has long been settled that there is no constitutional right to a jury in eminent domain proceedings." Pursuant to Rule 71A(h), Fed. R. Civ. P., "the court in its discretion" submitted the issue of just compensation to a commission. The petitioners cite no specific abuse of discretion on the part of the district court in referring the issue of just compensation to a commission, and the record below, which covers a period of nearly 10 years, reveals none.

Petitioners also complain of the refusal of the district court to award them the costs of litigation. However, costs are not assessable against the United States in the absence of specific statutory authority (*Dohany* v. *Rogers,* 281 U.S. 362), and several courts of appeals have concluded that the limited costs allowed by 28 U.S.C. 2412 are not allowable in condemnation cases. *United States* v. *2,186.63 Acres of Land, Wasatch Cty., Utah,* 464 F. 2d 676 (C.A. 10); *United States ex rel. T.V.A.* v. *Easement & Right-of-Way,* 452 F. 2d 729 (C.A. 6). Moreover, this issue was not included as one of the assignments of error, briefed or argued in the court of appeals and was not decided by that court. It is therefore not properly presented here. *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 330; *California* v. *Taylor,* 353 U.S. 553, 556-557 n. 2; *McCullough* v. *Kammerer Corp.,* 323 U.S. 327, 328.

Petitioners' contentions with respect to the adequacy of the award (Pet. 8-9) are directed to the weight of evidence and credibility of witnesses and not to any principle of law. These matters have been resolved by the triers of fact after three separate trials and do not warrant further review.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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